STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Judges: Servitto, P.J., and Wilder and Boonstra, JJ.
(Court of Appeals No. 323235 – 3rd Circuit Court No. 14-004589-CZ)

KEITH TODD,

Plaintiff- Appellant,

v. Supreme Court No.: 153049

NBC UNIVERSAL (MSNBC),

Defendant-Appellee

and

EASTPOINTE POLICE DEPARTMENT,
And A-ONE LIMOUSINE

Defendants.

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLEE NBC UNIVERSAL (MSNBC) IN RESPONSE TO SUPREME COURT ORDER OF NOVEMBER 2, 2016

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STATEMENT OF QUESTIONS PRESENTED

On November 2, 2016, this Court entered an order directing the parties to file supplemental briefs addressing three specific questions, which Defendant-Appellee answers as follows:

(1) Whether the erroneous statements contained in the television show aired by the defendant NBC Universal (MSNBC) must be considered in context with the pertinent facts and circumstances surrounding the statements, and if so, whether the statements viewed in that context rise to the level of extreme and outrageous conduct?

Defendant-Appellee answers: "Yes" to whether the statements must be considered in context, though Defendant-Appellee disagrees with Plaintiff-Appellant as to the relevant context, and "No" as to whether the statements, in that context, rise to the level of extreme and outrageous conduct

(2) Whether the statements in question are protected by the First Amendment?

Defendant-Appellee answers: "Yes"

(3) Whether the plaintiff should have been permitted to amend his complaint?

Defendant-Appellee answers: "No"

PROCEDURAL BACKGROUND

On August 7, 2011, Defendant-Appellee NBC Universal ("MSNBC") aired an episode of "Caught on Camera: Dash Cam Diaries 3" that erroneously identified Plaintiff-Appellant Keith Todd ("Todd") as the perpetrator of a limousine theft. As the Complaint alleges, the misidentification resulted from information MSNBC received from the Eastpointe Police, reversing the first and last names of the actual perpetrator, Todd Keith. *See* Complaint ¶ 58; Court of Appeals opinion at 1. Todd informed MSNBC of the error on February 2, 2014, two and half years after the episode first aired, and on February 23, 2014 a corrected version of the broadcast was aired that acknowledged and expressed regret for the error.

On April 19, 2014, Plaintiff filed a Complaint alleging defamation (Count I), negligent infliction of emotional distress (Count II), intentional infliction of emotional distress (Count III), and negligence (Count IV), all based upon the same error in the same news report. MSNBC moved for summary disposition under MCR 2.116(C)(7), on the basis that these claims were time-barred, and MCR 2.116(C)(8), on the basis that Counts II and III failed to state a claim on which relief could be granted. On July 24, 2014, the Circuit Court granted MSNBC's motion under (C)(7) and dismissed all of Todd's claims. The Circuit Court entered an order dismissing the case in its entirety on July 30, 2014.

Todd retained new counsel. On August 14, 2014 his new lawyer informed MSNBC that he would be filing a motion to amend the Complaint. The proposed Amended Complaint did not include any of the claims that the Circuit Court had dismissed. Instead, it sought to advance claims for false light invasion of privacy and misappropriation. Counsel for MSNBC indicated that the motion would be opposed. On August 18, 2014, Todd's counsel informed counsel for MSNBC that he was unable to get his motion to amend on the Circuit Court's calendar and would be filing a claim of appeal.

Todd's appeal abandoned his claims for defamation, negligent infliction of emotional distress, and negligence. He raised only two issues, claiming that the Circuit Court erred by (a) dismissing his claim for intentional infliction of emotional distress and (b) failing to consider Todd's proposed Amended Complaint.[1] The Court of Appeals affirmed, holding that Todd's Complaint did not allege conduct sufficiently egregious to state a claim for intentional infliction of emotional distress and that the Circuit Court did not abuse its discretion in declining to entertain Todd's motion to amend.

On January 20, 2016, Todd filed an Application for Leave to Appeal with this Court. MSNBC filed a timely Opposition. On November 2, 2016, this Court entered an order directing the parties to file supplemental briefs addressing: (1) "whether the erroneous statements contained in the television show aired by the defendant NBC Universal (MSNBC) must be considered in context with the pertinent facts and circumstances surrounding the statements, and if so, whether the statements viewed in that context rise to the level of extreme and outrageous conduct"; (2) "whether the statements in question are protected by the First Amendment"; and (3) "whether the plaintiff should have been permitted to amend his complaint."

Because Todd has no claim under Michigan tort law, MSNBC believes that it is not necessary for the Court to reach the second of these questions. This Supplemental Brief nevertheless answers all of these questions, in the sequence presented in the Court's order.[2]

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[1] This dyad of appellate claims is puzzling given that the proposed Amended Complaint did not purport to preserve any claim for infliction of emotional distress, negligent or intentional, but advanced only the invasion of privacy claims.

[2] The Court further directed that "[t]he parties should not submit mere restatements of their application papers." MSNBC has labored to honor that directive here but, of course, wishes to preserve all arguments made in its Opposition, which it expressly incorporates here by reference. Those include: (1) that Todd's Application does not meet the standard for review by this court (Opposition at 2-4); (2) that under Michigan tort law the allegations of the Complaint do not even approach the "extreme and outrageous" standard (Opposition at 4-6); (3) that the

ARGUMENT

I. Todd Misstates the Contextual Analysis that Applies to Claims for Intentional Infliction of Emotional Distress

In his Application for Leave to Appeal, Todd argues that the Court of Appeals erred by failing to address "the *context* of the defendant's conduct" in upholding the dismissal of his claim for intentional infliction of emotional distress. Application at 19 (emphasis in original). Apart from the fact that he never raised this theory below, Todd's argument suffers from three fatal infirmities. First, his argument does not consistently or coherently describe the context that he thinks matters here. Second, to the extent that his argument does describe a specific form of contextual analysis, it reflects a deep misunderstanding of the case law. And, finally, a proper contextual analysis of this case confirms that dismissal was proper.

Todd's introductory description of the contextual analysis that he claims applies here defies understanding. At one point, he suggests that a court should focus on "the defendant's conduct." Application at 19. In the very next sentence, he suggests that the focus should be "the context of the actions by the plaintiff." *Id.* At another point, he suggests that lower court decisions reflect a "movement toward" the use of a contextual analysis. *Id.* At yet another, he seems to imply that the lower courts are "unsure as to its application." *Id.*

After this inauspicious beginning, Todd cites a number of cases that he maintains stand for the proposition that a court should evaluate a claim for intentional infliction of emotional distress by considering the context of the relationship between the defendant and the plaintiff. If Todd stopped there this argument would be unremarkable and would not pose any problems:

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trial court acted within its discretion in declining to entertain Todd's motion to amend (Opposition at 7-9); and (4) that the proposed amendment would have been futile under Michigan tort law because Todd could not state meritorious claims for false light or misappropriation (Opposition at 9-11).

obviously, the existence of some sort of special relationship between the plaintiff and the defendant could affect a court's view of whether the conduct in question qualifies as "extreme and outrageous." Putting aside the question of whether such conduct would satisfy the tort, it seems inherently more outrageous, for example, if a doctor spreads gossip about a patient's embarrassing medical condition than it does if an idle acquaintance circulates the same information.

But Todd's argument *cannot* stop there because it does not help him. After all, there was *no relationship at all* between MSNBC and him at the time the broadcast in question was aired—and the Complaint alleges none. To the contrary, plaintiff and defendant were strangers to each other, which is of course precisely why the mistake happened. Again, the Complaint specifically alleges that MSNBC received the erroneous information about plaintiff from the Eastpointe Police. *See* Complaint at ¶ 58.

Because that argument does not help Todd he stretches it to the breaking point. In essence, he argues that the relational context that matters here is that MSNBC is a broadcaster and Todd is an individual. Application at 22. Todd argues that the Court of Appeals erred by not considering that (non-existent) "relationship" in evaluating his intentional infliction of emotional distress claim. This is a dazzling misreading of the case law.[3]

Todd relies most heavily on *Ledsinger v Burmeister*, 114 Mich App 12; 318 NW2d 558 (1982).[4] In that case, Ledsinger—a black man—entered into an agreement to purchase auto parts from a retailer in Troy and made a down payment. When he returned to the store, the retailer

[3] It should be noted that Todd does not contest that the question of whether the facts alleged could reasonably be found to constitute extreme and outrageous conduct is in the first instance one for the court. Indeed, the cases he cites are consistent with that principle. *See also Duran v Detroit News*, 200 Mich App 622; 504 NW2d 622 (1993).

[4] Discussed in the Application at 19-20.

informed him that the price had been increased over that set forth in the written contract. The complaint alleged that the retailer responded to the disagreement by calling Ledsinger a "nigger," telling him to get his "black ass" out of the store, and saying that he "did not want or need nigger business."

While noting that not every racial or ethnic slur may qualify as extreme and outrageous, the Court of Appeals concluded that a trier of fact could find that these statements satisfied the standard. In so ruling, the court emphasized that this case presented not just racial epithets, but "slurs in the course of a discriminatory act." *Id.* at 562. The court stressed that Burmeister threw Ledsinger "out of his place of business, ostensibly a public establishment" and refused to deal with Ledsinger "based on racial considerations." *Id.* The court declared that "[c]ritical to this case …. is the relation between the parties, that of a public merchant to his customer." *Id.* That relationship, of course, prohibits a merchant from engaging in such discriminatory conduct as a matter of law.[5]

Ledsinger's consideration of the relationship between the parties there makes sense on its facts. Indeed, the players in *Ledsinger* had *two* legally cognizable relationships: (1) they had entered into a contract and (2) one was the customer of the other at the latter's place of public accommodation. Significantly, the two parties also engaged with one another face to face. This case, in contrast, involves two parties who had no relationship at all and never even met.

Todd next cites, in passing, the decision of the Court of Appeals in *Margita v Diamond Mortgage Corp*, 159 Mich App 181; 406 NW2d 268 (1987).[6] That case is distinguishable on similar grounds. In *Margita*, plaintiff secured a loan arranged through defendant Diamond

[5] *See* MCLA 37.2302 (prohibiting places of public accommodation from discriminating based on race). Indeed, later in the opinion that Court of Appeals held that Ledsinger had stated a claim under this anti-discrimination law. *Ledsinger*, 114 Mich App at 24-25.

[6] Discussed in the Application at 20.

Mortgage. Although plaintiff made payments in a timely fashion, defendant instituted a program of harassing and insulting phone calls and dunning notices that lasted for years. The Court of Appeals held that the trier of fact might conclude that this abuse of their relationship rose to the level of extreme and outrageous conduct. Again, in this case no relationship at all existed between plaintiff and defendant at the time of the broadcast, let alone a contractual one.

A detailed analysis of the remaining cases cited by Todd is not necessary. All of them are to the same effect. *See McCahill v Commercial Union Insurance Co,* 179 Mich App 761; 446 NW2d 579 (1989)[7] (relationship between an insurer and its insured; jury question as to whether the insurer's conduct in investigating a fire loss claim was extreme and outrageous); *Melson v Botas*, 2014 WL 2867197 (Mich Ct App, Jun 19, 2014) (unpublished)[8] (relationship between teacher and her student; jury question as to whether the former intentionally inflicted emotional distress on the latter by yelling "why don't you just go kill yourself" and threatening to lock him in a room); *Burke v Detroit Public Schools*, 2006 WL 1156366 (Mich Ct App, May 2, 2006) (unpublished)[9] (relationship between a teacher and the school principal; jury question as to whether principal's ongoing race- and gender-based harassment of teacher constituted intentional infliction of emotional distress); *Pratt v Brown Machine Co*, 855 F2d 1225 (CA 6, 1988)[10] (relationship between employee and employer; jury question as to whether the latter intentionally inflicted emotional distress by taking steps to protect an upper-level manager who had jeopardized plaintiff's employment, "terrorized his family, and threatened to rape his wife"); and

[7] Discussed in the Application at 21.

[8] Discussed in the Application at 21.

[9] Discussed in the Application at 21-22.

[10] Discussed in the Application at 22.

Mroz v Lee, 5 F3d 1016 (CA 6, 1993)[11] (relationship between accountant and business associate; jury question as to whether the latter's misconduct met the test for intentional infliction of emotional distress). Again, each of these cases involved a relationship between the parties—one element that is conspicuously absent in the present case.

As noted above, Todd is not completely wrong in suggesting that context matters to a court's initial assessment of whether a plaintiff has stated a claim for intentional infliction of emotional distress. He has simply argued for the *wrong kind* of contextual analysis—a focus on a relationship that does not exist here. Two other forms of contextual analysis do apply, however, both of which demonstrate that the Court of Appeals reached the right result.

The first, and most obvious, consideration is that in each of the cases cited by Todd the factual context made clear that the conduct in question was *intentional*—as the tort requires. A person does not inadvertently scream racial epithets at a customer, make dozens of harassing phone calls over a two-year period, yell at a student that he should kill himself, or threaten to rape someone's wife. In every one of these cases, the alleged conduct clearly qualified as intentional.

In contrast, every fact alleged by Todd confirms that MSNBC's conduct here was a simple mistake. Todd does not, and cannot, allege that MSNBC even knew who he was, let alone that it set out to target him with an extreme and outrageous act. To the contrary, as noted above the Complaint alleges that MSNBC received its erroneous information from the Eastpointe Police and went from there. Complaint ¶ 58.[12] Moreover, it is self-evident from the standpoint of pure logic that a national news organization would not intentionally risk a self-inflicted blow to

[11] Discussed in the Application at 22.

[12] It is true that Todd's Complaint includes the boilerplate allegation that MSNBC's conduct was "intentional." But the Complaint offers no facts in support of this formulaic recitation and, indeed, the latter factual allegations of the Complaint contradict it.

its reputation by deliberately flipping the first and last names of a person identified in a published report. It is further undisputed that once the error was brought to its attention, MSNBC promptly aired a correction and publicly expressed regret for the error.

The second, and equally important, contextual consideration is that the conduct of MSNBC here consisted in broadcasting information about a crime and arrest. Reports on criminal activity are matters of public interest and concern, even where the crime in question is (as here) a colorful one.[13] In stark contrast, none of the cases cited by Todd involve speech on matters of public interest—to the contrary, most involve conduct that is not only against the public interest but against the law because of its discriminatory, harassing, or threatening nature.

There is a final and critical reason to reject Todd's proposed contextual analysis. If Todd were right, then *every* case in which an individual plaintiff sued a media entity for intentional infliction of emotional distress would go to trial. After all, Todd's argument comes down to this: given the power of media entities to cause harm, it is inherently extreme and outrageous for them ever to make a mistake in their reporting about an individual. *See* Application at 22. As discussed above, this argument finds no support in tort law and the cases that Todd cites, and it would invite specious pleading of emotional distress claims to circumvent tighter statute of limitations periods—and, as discussed below, constitutional constraints—on defamation claims. Indeed, such a principle would run afoul of constitutional protections recognized by the Supreme Court of the United States, as discussed further in the next section, where we address the second question posed by this Court's order.

[13] *See* discussion of *Snyder v Phelps*, *infra*.

II. The Speech at Issue Here is Protected by the First Amendment

The second question posed by the Court's order is whether the speech at issue is protected by the First Amendment. As noted in MSNB's Opposition and here, Todd's emotional distress claim fails under Michigan tort law because he cannot in good faith allege that he was intentionally targeted. Accordingly, this Court need not reach this constitutional question.[14] Should the court elect to do so, however, decisions from the Supreme Court of the United States clearly indicate that the First Amendment does indeed insulate MSNBC's speech from liability on a theory of intentional infliction of emotional distress.

A brief discussion of the evolution of First Amendment jurisprudence provides a useful backdrop to the appropriate constitutional analysis. Prior to 1964, the law of the First Amendment and state tort law existed and developed along parallel tracks, without one having much if any influence over the other. But this changed dramatically with the Supreme Court's decision in *New York Times Co v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964).

Sullivan concerned a March 29, 1960 advertisement published in the New York Times and entitled "Heed Their Rising Voices." The ad described how student demonstrators and Dr. Martin Luther King had been met with a "wave of terror" by "truckloads of police" and unnamed "Southern violators" in Montgomery, Alabama. L.B. Sullivan—an elected Commissioner of the City of Montgomery who supervised the police department—brought a libel action against The New York Times Company and several clergymen who endorsed the advertisement. A jury found for Sullivan and awarded him damages of $500,000—the full amount claimed—and the

[14] See *J&J Coast Co v Bricklayers and Allied Craftsman, Local 1,* 468 Mich 722, 734; 664 NW2d 728 (2003) ("[I]t is an undisputed principle of judicial review that questions of constitutionality should not be decided if the case may be disposed of on other grounds.")

Supreme Court of Alabama affirmed. The United States Supreme Court granted certiorari and issued its unanimous decision on March 9, 1964.

The Court reversed the decision below, finding that "the rule of law applied by the Alabama courts [was] constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments."[15] The Court held that these constitutional provisions require "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[16] The Court concluded that, because Sullivan had failed to prove that the defendants had acted with actual malice, the jury verdict could not stand.[17]

With *Sullivan*, the Supreme Court for the first time held that the First Amendment places restrictions on state defamation law. As one might expect, many plaintiffs responded by pursuing other state tort claims, often piggybacked on a defamation claim that they worried might not survive. Plaintiffs gravitated toward claims for intentional infliction of emotional distress in the hope that this strategy would allow them to circumvent the constitutional limitations described in *Sullivan.*

The first such case to reach the Supreme Court was *Hustler Magazine, Inc v Falwell*, 485 US 46; 108 S Ct 876; 99 L Ed 2d 41 (1988). In that case, Hustler Magazine published a parody of the advertisements that Campari Liqueur was then running in which celebrities talked about

[15] *Sullivan*, 376 US at 265.

[16] *Id.* at 280.

[17] *Id.* at 286.

their "first time." Although they were ostensibly addressing their first time tasting Campari, the ads played on the obvious sexual double entendre.

The Hustler Magazine parody focused on evangelist Jerry Falwell and his "first time." Without even a hint of nuance, the ad indicated that Rev. Falwell's initial sexual encounter had consisted of an incestuous rendezvous with his mother in an outhouse. Falwell sued for defamation, invasion of privacy, and intentional infliction of emotional distress. The trial court directed a verdict for Hustler on the invasion of privacy claim and the jury found against Falwell on the defamation claim. But the jury ruled against Hustler on the infliction of emotional distress claim, awarding Falwell $100,000 in compensatory damages and $50,000 in punitive damages. In an opinion written by Chief Justice Rehnquist, the Court reversed.

The Court acknowledged that under the tort law of most if not all jurisdictions a plaintiff need only prove that the defendant had engaged in "outrageous" conduct to prevail on a claim for intentional infliction of emotional distress.[18] But the Court declared that "outrageousness" has "an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."[19] The Court discussed at length the important role that parody has played in our political discourse, and expressed skepticism over whether a principled line could be drawn between such parody and the ad in Hustler; "we doubt that there is any such standard," the Court declared, "and we are quite sure the pejorative description 'outrageous' does not supply one."[20]

The Court observed that Falwell was a "public figure" and was therefore obligated under *Sullivan* and its progeny to prove in his defamation claim that Hustler had acted with "actual

[18] *Id.* at 53.

[19] *Id.* at 55.

[20] *Id.*

malice." The Court pointed out that the jury had rejected Falwell's defamation claim on the basis that the parody could not even be reasonably understood as stating facts about him (let alone knowingly false ones).[21] Declining to afford any less protection to Hustler simply because Falwell had labeled his claim as one for intentional infliction of emotional distress, the Court applied the "actual malice" standard and concluded that this claim was subject to dismissal for the same reasons.[22]

The Court's skepticism about using an "outrageousness" standard to limit speech—particularly speech on a matter of public interest and concern—received its fullest and most recent expression in *Snyder v Phelps*, 562 US 443; 131 S Ct 1207; 179 L Ed 2d 172 (2011). That case involved speech by the extremist Westboro Baptist Church, whose members believe that God has condemned the United States because of its tolerant approach to homosexuality and that God expresses this condemnation, at least in part, through the deaths of American soldiers. The Westboro Baptist Church chooses to express these views by protesting at the memorial services of members of the United States military who died in combat.

In that case, the Westboro Baptist Church had engaged in a protest near the site of the funeral of Lance Corporal Matthew Snyder, who had been killed in Iraq in the line of duty. They carried their usual offensive and inflammatory signs, including one that said "Thank God for Dead Soldiers." Snyder's father sued Westboro and its leaders on a variety of theories, including intentional infliction of emotional distress. The jury found in his favor, awarding him $2.9 million in compensatory damages and $8 million in punitive damages. The Supreme Court granted review and, in an opinion written by Chief Justice Roberts, reversed.

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[21] *Id* at 57.

[22] *Id.* at 56-57.

The Court began by noting that "[w]hether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern."[23] The Court defined "public concern" expansively: "Speech deals with matters of public concern when it can 'be fairly considered as relating to *any* matter of political, social, or other concern to the community' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'"[24] The Court noted that in deciding whether the speech was a matter of public concern the content, form, and context of the speech matters.[25] As we will see, the Court meant something entirely different than Todd does when it used the word "context."

Applying these standards, the Court easily concluded that Westboro's speech—noxious as it was—addressed a matter of public concern.[26] As to "content," the Court held that Westboro's signs related to issues of interest to the public at large rather than to a matter of purely private concern. The Court held that the form of the speech—a protest on public land—was non-objectionable.[27] And the Court rejected Snyder's argument that the fact that the speech took place in the "context" of a private funeral somehow undermined the conclusion that it addressed a matter of public concern.[28]

In other words, the contextual analysis endorsed by the *Snyder* Court focuses on the public interest nature of the speech—*not* on the sort of *vulnerability* considerations that Todd

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[23] 562 US at 451.

[24] *Id.* at 453 (internal citations omitted and emphasis supplied).

[25] *Id.*

[26] *Id.* at 453-459.

[27] *Id.* at 457-458. The Court does not expressly use the word "form" here but this appears to constitute the Court's form analysis.

[28] *Id.* at 455.

invokes in his Application. Indeed, it is difficult to imagine a more vulnerable and sympathetic plaintiff than the grieving Mr. Snyder. If that sort of consideration drove the analysis then surely Mr. Snyder—accosted by Westboro's vile speech while in the midst of mourning his deceased son—would have prevailed. Importantly, the Court went on to observe that "[t]here was no pre-existing relationship between Westboro and Snyder that might suggest Westboro's speech on public matters was intended to mask an attack on Snyder over a private matter."[29] The same reasoning applies here. As noted above, Todd and MSNBC were strangers to each other.

When we apply the proper form of contextual analysis here we see that dismissal of Todd's intentional infliction claim was exactly the right result—indeed, the result the First Amendment commands. The broadcast in question did not relate to a matter of private concern but, rather, to a very public crime and a very public arrest. There is nothing inherently objectionable in the form of a broadcast. And nothing about its context suggests that it addressed a purely private matter. MSNBC's speech was therefore clearly protected by the First Amendment.[30] This also leads to the answer to the third question posed by the Court.

III. The Proposed Amendment Would Have Been Futile

As discussed in the Procedural Background section above, after the Circuit Court dismissed this case Plaintiff sought leave to amend his Complaint to assert two invasion of

[29] *Id.* at 455.

[30] Courts in other jurisdictions have, relying on *Snyder*, held that the First Amendment barred claims for intentional infliction of emotional distress. *See, e.g.*, *Harrington v Hall County Bd of Supervisors*, 2016 WL 1274534, at *10 (D Neb, Mar 31, 2016) (dismissing claim related to language contained in a petition circulated in opposition to a strip club because the speech was protected by the First Amendment); *Rodriguez v Fox News Network, LLC*, 238 Ariz 36, 39-42; 356 P3d 322 (2015) (affirming dismissal of claim arising out of video airing the suicide of plaintiffs' father on live television as barred by the First Amendment); *Dumas v Koebel*, 352 Wis 2d 13, 29-33; 841 NW2d 319 (2013) (affirming summary judgment for defendant where First Amendment precluded claim based on news broadcast revealing prior criminal convictions of plaintiff, a school bus driver). These cases are attached as Exhibit 1.

privacy claims (false light and misappropriation), while dropping all of his previously pleaded claims. Although under many circumstances a court should freely grant leave to amend, a court can and should decline to do so where amendment would be futile. *See Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997) ("A motion to amend ordinarily should be granted, and should be denied only for the following particularized reasons: [1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] ***futility***...." (emphasis added)). The amendment proposed by Todd would have been completely pointless under controlling tort law.[31]

Snyder further indicates that Todd's proposed amendment would have been utterly pointless as a matter of *constitutional* law. Recall that, in *Snyder*, the plaintiff brought and prevailed before the jury on an invasion of privacy claim (intrusion upon seclusion) and a civil conspiracy claim. The Court reversed those verdicts as well.

Snyder argued that the First Amendment should not shield Westboro from an invasion of privacy claim because he was a "captive audience" at his son's funeral. Snyder's argument was based an exception to First Amendment protections that the Court has on rare occasions recognized where an unwilling listener is exposed to speech he or she cannot escape; thus, as the Court noted, it has upheld a statute that prohibits picketing in the immediate presence of someone's residence.[32] But the Court refused to apply that narrow exception, observing that "[i]n most circumstances, the Constitution does not permit the government to decide which types of

[31] *See* Opposition to Plaintiff-Appellant Keith Todd's Application for Leave to Appeal at 9-11 (pointing out that Todd could not plead a vital false light claim because he cannot in good faith allege actual malice and he could not plead a viable misappropriation claim because the MSNBC broadcast is newsworthy).

[32] *Id.* at 459-460.

otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer," and noting that in any event the protestors here "stayed well away from the memorial service." In sum, the Court held that the First Amendment barred this privacy claim as well as the intentional infliction of emotional distress claim, and no exception applied.

The Court then made quick work of plaintiff's civil conspiracy claim, again stressing First Amendment protections. The Court declared: "Because we find that the First Amendment bars Snyder from recovery for intentional infliction of emotional distress or intrusion upon seclusion—the alleged unlawful activity Westboro conspired to accomplish—we must likewise hold that Snyder cannot recover for civil conspiracy based on those torts."[33] Snyder's invasion of privacy and conspiracy claims thus fell, too.

For all of these reasons—as well as those set forth in MSNBC's Opposition to Plaintiff-Appellant Keith Todd's Application for Leave to Appeal—the Court of Appeals did not err by declining to remand the case in order to indulge the plaintiff in a pointless amendment.

CONCLUSION

In his Application, Todd has provided this Court with (1) a deeply flawed argument that is (2) based on a misreading of the Michigan case law that would (3) lead to a principle that the Supreme Court of the United States has rejected under the First Amendment. MSNBC respectfully submits that with this trifecta this case should come to an end. MSNBC urges this Court to decline the Application or to affirm the decision of the Court of Appeals

[33] *Id.* at 460.

Respectfully submitted,

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EXHIBIT 1

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Shane Harrington, Plaintiff,
v.
Hall County Board of Supervisors, et al., Defendants.

4:15-CV-3052
|
Signed March 31, 2016

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MEMORANDUM AND ORDER

John M. Gerrard, United States District Judge

***1** The plaintiff, Shane Harrington, is a Nebraska resident who operates an adult entertainment company. He has sued numerous individuals and entities who, he alleges, have violated his rights by taking steps to prevent him from opening a juice bar and strip club in Hall County, Nebraska. This matter is before the Court on several defendants' motions to dismiss (filings 46, 57, 69, 71, and 73), a motion to strike certain evidence the plaintiff has offered in opposition to these motions to dismiss (filing 111), and two plaintiff's motions to amend his complaint and consolidate this action with another case (filing 78 and 114).

BACKGROUND

Briefly summarized, the plaintiff's allegations are as follows. [1] Beginning in February 2015, the plaintiff sought to secure a location for an adult entertainment venue in Hall County. Filing 1 at 4. According to the plaintiff, he plans to open this business outside of Grand Island city limits, and more than 1,000 feet from "any restricted areas or districts." Filing 1 at 5. The plaintiff alleges that his proposed business will benefit the community, and will not lead to any illegal activities. Filing 1 at 5.

[1] The Court omits from this summary of the plaintiff's complaint all legal conclusions and characterizations. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Many passages of the complaint read more like a brief than allegations of fact. Plaintiff's counsel would do well to reflect on the purposes of Rule 8: clearly informing the defendant and the Court of the facts necessary to establish plaintiff's claims for relief.

According to the plaintiff, the defendants have taken various steps to prevent him from opening his business in Hall County. First, the plaintiff alleges that in 2004, defendant Hall County Board of Supervisors adopted a zoning resolution which restricts sexually oriented businesses to "tiny industrial districts constituting less than 0.1% of the entire Hall County land mass, where there are in fact no available locations." Filing 1 at 2. In addition, the zoning regulation restricts such businesses from operating between 12 and 6 a.m. Filing 1 at 2.

Next, the plaintiff alleges that "Defendant[s] individually, and collectively, have created, circulated, signed, published and promoted" a petition opposing the plaintiff's proposed business. Filing 1 at 6. The plaintiff specifically alleges that the Evangelical Free Church of Grand Island, Nebraska, Third City Christian Church, and Kent Mann (the director of Third City Christian Church) circulated and promoted the petition. Filing 1 at 8. And the plaintiff alleges that John and Jane Does 1–1,000 signed it. Filing 1 at 13. But otherwise, the plaintiff does not specifically allege that any particular defendant had a role in creating, circulating, signing, publishing, or promoting the petition. The complaint reproduces the petition as follows:

> Petition to stop Shane Harrington from opening a strip club. We the undersigned citizens from the town of Grand Island Nebraska and surrounding communities petition the Grand Island City Council and Hall County Board of Supervisors to not allow Shane Harrington to bring a strip club to this area. A strip club would promote sexual violence, prostitution, a larger burden on the area law enforcement officials, and will tear down and destroy families and individuals. Additionally, whether intentional

> or not, the adult entertainment industry promotes the exploitation of women for the entertainment of others and opens the door for potential trafficking of women. We demand that the Grand Island City Council and Hall County Board of Supervisors take any and all action necessary to protect the City of Grand Island Nebraska and all surrounding communities from suffering the negative consequences mentioned above.

***2** Filing 1 at 3.

On May 7, 2015, there was a public hearing in Hall County about the petition. Filing 1 at 3. The plaintiff alleges that this hearing was held without notice to him or the public. Filing 1 at 3. The plaintiff alleges that at this hearing, two members of the Hall County Board of Supervisors made statements endorsing the petition. First, the plaintiff alleges that the defendant Pam Lancaster, a member of the Hall County Board of Supervisors, said, "It really is vital that people—who believe in the Christian basis of life stand for them ... I'm of a similar mind as well." Filing 1 at 7 (alteration in original). Second, the plaintiff alleges that defendant Doug Lanfear, a member of the Hall County Board of Supervisors, said, "I want to thank you for bringing your Christian values to the forefront ... I want to thank you for getting this petition." Filing 1 at 7 (alteration in original).

In addition, the plaintiff alleges that various individuals made statements to the press in opposition to his plan to open a strip club in Hall County. First, the defendant alleges that Chad Nabity, the Regional Planning Director of Hall County, told the Grand Island Independent that "we have places where it can be done" and that the plaintiff could open his business in a "manufacturing or commercially zoned area in Grand Island." Filing 1 at 3. According to the plaintiff, this assertion was false because adult businesses are permitted to operate only in industrial districts in Hall County. Filing 1 at 3. Second, the plaintiff alleges that the defendant Shay McGowan, a Grand Island business owner, told the Independent that strip clubs constitute the felony of sex trafficking. Filing 1 at 6. Finally, the plaintiff alleges that the defendant Keith Baumfaulk, a St. Paul resident, told the Independent that "God put this on my heart with this strip club coming in ... it's wrong in God's eyes." Filing 1 at 7 (alteration in original).

According to the plaintiff, the actions of the defendants have "destroyed [his] reputation to the extent that no one in Hall County will sell or lease [him] property for his business." Filing 1 at 7. The plaintiff alleges that the first real estate broker he hired to find a location for his business "informed [him] that he would not be able to find a location" as a result of the petition and the defendants' other actions. Filing 1 at 6. The plaintiff alleges that he retained a new real estate broker, and offered that broker an additional $10,000 bonus if the broker could obtain a location for the plaintiff's business in Hall County. Filing 1 at 6. The broker did locate a property, and the plaintiff and property owners entered into negotiations. Filing 1 at 6. However, according to the plaintiff, as a result of the defendants' actions, "on or about May 11, 2015, the property owners informed Plaintiff's real estate broker that they could not sell the subject property to Plaintiff for any price." Filing 1 at 7. The plaintiff's broker subsequently informed the plaintiff that he "could not purchase or lease any property in Hall County, as no individual or entity will enter into a sale or lease contract" with him. Filing 1 at 7.

***3** Finally, the plaintiff alleges that each of the defendants "have engaged in a conspiracy to violate Plaintiff's civil rights and defame Plaintiff and are jointly and severally liable for the damages herein alleged." Filing 1 at 9. The plaintiff has brought eleven causes of action; each against all of the defendants. First, he has brought four claims under 42 U.S.C. § 1983, alleging that the defendants have violated the Establishment Clause of the First Amendment, the Freedom of Speech Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment and Nebraska Constitution, and the Due Process Clause of the Fourteenth Amendment and Nebraska Constitution. Filing 1 at 14, 18, 20, 21. Next, he has brought antitrust claims, under the Sherman Act and Clayton Act. Filing 1 at 15–17. And finally, he has brought five state law tort claims: defamation; negligent hiring, training, and supervision; tortious interference with business relationships; infliction of emotional distress; and negligence. Filing 1 at 22–26.

According to the plaintiff, his damages include "lost income, estimated at $40,000 per month, as well as emotional and psychological injuries, entitling Plaintiff to

compensatory damages in the amount of $10 million." Filing 1 at 9. The plaintiff additionally seeks "punitive damages in the amount of $100 million to punish the Defendants and deter such conduct in the future, together with attorney's fees and the costs of this action." Filing 1 at 9. Finally, the plaintiff seeks "a declaratory judgment enjoining Defendants from enforcing their zoning resolution as prior restraint," filing 1 at 20, as well as an injunction "precluding Defendants from using Plaintiff's name in their petition and requiring Defendants to allocate a property in Hall County for Plaintiff's business," filing 1 at 27.

STANDARD OF REVIEW

A complaint must set forth a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). This standard does not require detailed factual allegations, but it demands more than an unadorned accusation. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The complaint need not contain detailed factual allegations, but must provide more than labels and conclusions; and a formulaic recitation of the elements of a cause of action will not suffice. *Twombly*, 550 U.S. at 555. For the purposes of a motion to dismiss a court must take all of the factual allegations in the complaint as true, but is not bound to accept as true a legal conclusion couched as a factual allegation. *Id.*

And to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must also contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Iqbal,* 556 U.S. at 678. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief. *Id.* at 679.

Determining whether a complaint states a plausible claim for relief will require the reviewing court to draw on its judicial experience and common sense. *Id.* The facts alleged must raise a reasonable expectation that discovery will reveal evidence to substantiate the necessary elements of the plaintiff's claim. *See Twombly*, 550 U.S. at 545. The court must assume the truth of the plaintiff's factual allegations, and a well-pleaded complaint may proceed, even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely. *Id.* at 556.

DISCUSSION

1. MOTION TO STRIKE

As an initial matter, the defendants Third City Christian Church ("Third City") and Evangelical Free Church of Grand Island, Nebraska ("Evangelical Free Church") (collectively, "the Church Defendants") have moved to strike certain evidence the plaintiff has offered in opposition to the defendants' motions to strike. Filing 111. In response to the various motions to dismiss that are currently pending, the plaintiff has filed six separate but identical briefs. *See*, filings 84, 86, 87, 88, 89, 94. The plaintiff has filed multiple indexes of evidence in support of these briefs. *See* filing 85, 90, 91, 92, 93, 96, 97, 98, 99. Each index of evidence contains a "Narrative Report of Dr. Daniel Linz Plus 17 Exhibits." *See, e.g.,* filing 99. Evangelical and Third City move to strike this report, its accompanying attachments, and all references to the report and its attachments in the plaintiff's briefs opposing the motions to dismiss. Filing 112 at 2.

***4** When deciding a motion to dismiss under Rule 12(b)(6), the Court is normally limited to considering the facts alleged in the complaint. If the Court considers matters outside the pleadings, the motion to dismiss must be converted to one for summary judgment. Fed. R. Civ. P. 12(d). However, the Court may consider exhibits attached to the complaint and materials that are necessarily embraced by the pleadings without converting the motion. *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 697 n.4 (8th Cir. 2003). Documents necessarily embraced by the pleadings include those whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading. *Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012). The Court may also take notice of public records. *Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007).

Here, Linz's report and its attachments were not mentioned in the complaint, nor are they public records. The plaintiff contends that the Court should nonetheless consider them because they are "presented in admissible

form" and are relevant to "the defamatory nature of Defendants' statements and publications concerning Plaintiff." Filing 124 at 1. But a motion to dismiss under Rule 12(b)(6) tests only the sufficiency of the allegations in the complaint, not the sufficiency of the evidence offered to support those allegations. Accordingly, the Court will not consider the Linz report and its attachments in resolving the pending motions to dismiss.

2. MOTIONS TO DISMISS

(a) Kent Mann

The defendant Kent Mann has moved to dismiss (filing 69) on various grounds. Specifically, he contends that the complaint fails to allege he participated in the alleged wrongful acts, and that "even if it did, it would fail to state any actionable claims against him." Filing 70 at 5. Mann also requests attorney's fees under the Nebraska anti-SLAPP statute, Neb. Rev. Stat. § 25-21,241 *et seq.*, and 18 U.S.C. § 1988.

1. Motion to dismiss

First, Mann argues that the plaintiff has failed to state a claim against him because he has failed to allege that Mann personally participated in any of the alleged wrongs. Filing 70 at 5–6. The complaint mentions Mann specifically only twice. First, it alleges, "Defendant THIRD CITY CHRISTAIN [sic] CHURCH authorized and participated in the aforementioned civil rights violations and defamation by and through their leadership, including but not limited to ... Director and Defendant KENT MANN ...." Filing 1 at 8. The second instance merely repeats a portion of the first: "Defendant KENT MANN is a Director of THIRD CITY CHRISTIAN CHURCH ...." Filing 1 at 13.

Mann's alleged status as director of Third City is insufficient to establish his liability on any of the plaintiff's claims.[2] First, his director status is insufficient to establish his liability under § 1983. To state a plausible claim for relief under § 1983 against an individual defendant, the complaint must allege facts supporting that defendant's "personal involvement or responsibility for the violations." *See Ellis v. Norris*, 179 F.3d 1078, 1079 (8th Cir. 1999). The plaintiff has not done so here.

[2] Additionally, even if Mann could be held liable for the actions of Third City, as explained below, the plaintiff has also failed to allege facts giving rise to a plausible claim for relief against Third City.

Second, Mann's alleged status as director of Third City is insufficient to establish his liability for violations of anti-trust laws. The plaintiff brings two causes of action: one alleging violations of §§ 1 and 2 of the Sherman Act, and one alleging violations of §§ 4 and 16 the Clayton Act. But §§ 4 and 16 of the Clayton Act do not furnish independent causes of action; rather, they permit private parties to bring an action for relief upon a showing of a separate violation of the antitrust laws. *See* 15 U.S.C. §§ 15, 26. Accordingly, the Court construes the plaintiff's complaint as bringing a single cause of action under §§ 4 and 16 on the basis of alleged violations of §§ 1 and 2 of the Sherman Act.

***5** Corporate officers, directors, or agents can be personally liable for a corporation's anti-trust violations only if they participate in, order, or authorize those actions. *See Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476, 482 (E.D. Mo. 1965) *aff'd sub nom. Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679 (8th Cir. 1966); *see also,* 15 U.S.C. § 24; *United States v. Wise*, 370 U.S. 405, 416 (1962). Here, the plaintiff has not alleged that Mann took any particular action to participate in, authorize, or order Third City's alleged wrongdoing.

Third, Mann's status as director of Third City is insufficient to establish his liability under state tort law. Under Nebraska law, the directors of a corporation are generally not liable to third persons for the acts of the corporation solely by virtue of their status as directors. *Huffman v. Poore*, 569 N.W.2d 549, 556 (Neb. Ct. App. 1997). Rather, a director will be individually liable for the acts of a corporation only if he takes part in their commission. *Id.* at 558 (quoting 3A William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 1137 at 300–01 (1994)). The plaintiff has not alleged any particular actions Mann took to participate in Third City's purported wrongdoing. Thus, the complaint's allegations that Mann is a director of Third City are insufficient to state a claim against him for any of the wrongs Third City is alleged to have perpetuated.

In addition to the allegations that mention Mann by name, the complaint also contains generalized allegations that

"Defendants" have all committed each of the purported wrongs. But the problem with this pleading strategy is it does not inform any particular defendant of the specific claims against him in sufficient detail to permit him to defend himself against the claims. *See*, *Iqbal,* 556 U.S. at 678; *Ellis*, 179 F.3d at 1079 (affirming dismissal of a § 1983 case where the complaint failed to allege facts supporting any individual defendant's personal involvement in alleged constitutional violations). Accordingly, these generalized allegations are also insufficient to state a plausible claim for relief against Mann, and all of the plaintiff's claims against Mann will be dismissed.

2. Attorney's fees

Mann also argues that he is entitled to attorney's fees under Nebraska's anti-SLAPP statute, Neb. Rev. Stat. § 25-21,241 *et seq.* and 42 U.S.C. § 1988.

First, Mann requests attorney's fees under Nebraska's anti-SLAPP statute, which provides, "A defendant in an action involving public petition and participation may maintain an action, claim, cross-claim, or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action." Neb. Rev. Stat. § 25-21,243. The statute specifies that costs and attorney's fees are recoverable if "the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law." *Id.* An action involving public petition and participation is defined as one "that is brought by a public applicant or permittee and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge, or oppose the application or permission." Neb. Rev. Stat. § 25-21,242. A public applicant or permittee, in turn, is "any person who has applied for or obtained a permit, zoning change, lease, license, certificate, or other entitlement for use or permission to act from any government body." *Id.*

***6** The plaintiff argues that he is not a public applicant or permittee within the meaning of the statute because he never actually applied for permission from Hall County to open his proposed strip club. And there is no evidence in the record suggesting that he has. However, the Court need not determine this point at this stage in the proceedings, because a motion for attorney's fees has not been made pursuant to Fed. R. Civ. P. 54.

State laws providing a right to attorney's fees are considered *Erie*-substantive. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260 n.31 (1975). Accordingly, when a federal court exercises diversity or pendent jurisdiction over state law claims, it will enforce state law regarding attorney's fees. *See Felder v. Casey*, 487 U.S. 131, 151 (1988). However, federal courts will not enforce the procedural components of a state statute that grants a substantive right. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 429 (1996).

In other words, this Court is required to give effect to the substantive right to attorney's fees and costs created by Nebraska's anti-SLAPP statute. However, the Court shall apply federal procedure, rather than the procedure set forth by the statute, in deciding whether to award those fees and costs. The appropriate mechanism for requesting attorney's fees in federal court is Fed. R. Civ. P. 54. Under this rule, a claim for attorney's fees must be made by motion, filed no later than 14 days after the entry of the judgment. Fed. R. Civ. P. 54(d)(2). Thus, if Mann wishes to pursue his claim for attorney's fees under the anti-SLAPP statute, he may file a motion in accordance with the provisions of Rule 54.

Mann also requests attorney's fees under 42 U.S.C. § 1988, which provides that for a § 1983 action, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. But attorney's fees should be awarded only when the "claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Hughes v. Rowe*, 449 U.S. 5, 15 (1980) (per curiam) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978)). A plaintiff's claims are not groundless merely because they "were properly dismissed for failure to state a claim." *Id.* at 15. As long as "the plaintiff has 'some basis' for [his] claim, a prevailing defendant may not recover attorneys' fees." *EEOC v. Kenneth Balk & Assocs., Inc.*, 813 F.2d 197, 198 (8th Cir. 1987) (quoting *Obin v. Dist. No. 9 of the Int'l Ass'n of Machinists*, 651 F.2d 574, 587 (8th Cir. 1981)).

Again, the Court need not determine at this stage whether Mann is entitled to attorney's fees under § 1988. Mann may file a motion pursuant to Rule 54 to assert his claim to those fees.

(b) Church Defendants

The Church Defendants have moved to dismiss the plaintiff's complaint on several grounds, arguing that the plaintiff has failed to state any plausible claim for relief against them. Filing 47 at 3.

1. Consideration of petition

As an initial matter, the Church Defendants have attached to their motion a copy of the petition the defendants allegedly circulated in opposition to the plaintiff's plan to open a strip club. Filing 48-2. The Church Defendants request that the Court consider it in resolving their motion to dismiss. Filing 47 at 2–3. As discussed above, in considering a motion to dismiss, the Court may, without converting the motion to one for summary judgment, consider those documents that are "necessarily embraced by the pleadings." *Mattes*, 323 F.3d at 697 n.4. Documents necessarily embraced by the pleadings include those whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading. *Ashanti*, 666 F.3d at 1151. Here, the plaintiff alleges the contents of the petition in his complaint, *see* filing 1 at 3, and neither party disputes the authenticity of the petition.[3] Accordingly, the Court will consider the petition without converting the Church Defendants' motion to dismiss to a motion for summary judgment.

3 The Court notes that there are some very minor discrepancies between the petition as reproduced in the plaintiff's complaint, and the copy of the petition attached to the Church Defendants' motion to dismiss. These discrepancies add up to a few small changes to individual words and punctuation, and do not alter the Court's analysis.

2. Constitutional violations

***7** The plaintiff alleges that the defendants have violated his rights under the Establishment Clause of the First Amendment, the Freedom of Speech Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fourteenth Amendment, and the Equal Protection and Due Process clause of Art. I, § 3 of the Nebraska Constitution. Filing 1 at 14, 18, 20, 21. He sues under 42 U.S.C. § 1983 for the alleged violations of his federal constitutional rights. Filing 1 at 14.

The Church Defendants have moved to dismiss these claims on the grounds that only state actors can violate those particular constitutional rights. *See* filing 47 at 4. And, indeed, they are correct. The only amendment of the federal Constitution that can be violated by a non-government actor is the Thirteenth—which the plaintiff has not alleged a violation of. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991). Likewise, the Equal Protection and Due Process clauses of the Nebraska Constitution apply only to government action. *See Citizens of Decatur for Equal Educ. v. Lyons-Decatur Sch. Dist.*, 739 N.W.2d 742, 756 (Neb. 2007).

The plaintiff argues that, nonetheless, the Church Defendants can be held liable for alleged violations of his constitutional rights under § 1983 because they were acting under color of state law. Filing 84 at 12. Specifically, the plaintiff argues that his complaint "sufficiently pleaded the conspiracy between the private Defendants and governmental entities acting under color of law." Filing 84 at 12.

Section 1983 allows plaintiffs to bring claims against persons who violate their constitutional rights under color of state law. 42 U.S.C. § 1983. A private actor can be considered to act under color of state law "if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

This "close nexus" exists where the private party is "'a willful participant in joint activity with the State' in denying a plaintiff's constitutional rights." *Magee v. Trustees of Hamline Univ., Minn.*, 747 F.3d 532, 536 (8th Cir. 2014) (quoting *Dossett v. First State Bank*, 399 F.3d 940, 947 (8th Cir. 2005)). Thus, to survive a motion to dismiss, a "plaintiff must plausibly allege 'a mutual understanding, or a meeting of the minds, between the private party and the state actor.'" *Id.* In doing so, the plaintiff must allege something more than "multiple contacts" between the private party and the state; rather, he must plead "specific facts plausibly connecting" the alleged concerted action to the alleged violation. *Id.*

Here, the complaint alleges in conclusory terms that "Defendants have engaged in a conspiracy to violate Plaintiff's civil rights and defame Plaintiff," and "Defendants have engaged in a conspiracy to adopt and enforce an unconstitutional zoning resolution." Filing 1 at 9. But "a naked assertion of conspiracy ... without some further factual enhancement ... stops short of the line between possibility and plausibility of entitlement to relief." *Twombly*, 550 U.S. at 557 (internal quotation marks omitted). The plaintiff has not alleged any facts plausibly suggesting that the Church Defendants conspired with government actors in any way. Accordingly, the constitutional claims against the Church Defendants are dismissed as to the Church Defendants.

3. Anti-trust violations

***8** Next, the plaintiff alleges that the Church Defendants have committed anti-trust violations. Filing 1 at 15, 17. As explained above, the plaintiff brings his claim under §§ 4 and 16 of the Clayton Act, which allow a plaintiff to bring suit for separate anti-trust violations. The plaintiff alleges that the defendants have violated §§ 1 and 2 of the Sherman Antitrust Act. Filing 1 at 16. The Church Defendants argue that to the extent their actions violated the Sherman Act, the *Noerr-Pennington* doctrine immunizes them from liability. Filing 47 at 5.

Under the *Noerr-Pennington* doctrine, "attempts to induce the passage or enforcement of law or to solicit governmental action" are not prohibited by anti-trust laws, "even though the result of such activities is to cause injury to others." *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 486 (8th Cir. 1985); *see, E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 143–44 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965). To conclude otherwise would "deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." *Noerr*, 365 U.S. at 139.

The only actions allegedly taken by the Church Defendants are "creating, promoting, circulating, distributing, copying, publishing, signing and submitting" a petition opposing the plaintiff's plan to open a strip club. Filing 1 at 8. This clearly falls within the scope of the *Noerr-Pennington* protection. The plaintiff additionally argues that the Church Defendants were "engaged in a conspiracy to prohibit sexually oriented businesses" in Hall County, giving rise to anti-trust liability. Filing 84 at 27. But, as explained above, this naked assertion of conspiracy is insufficient to state a plausible claim for relief. Consequently, the anti-trust allegations are dismissed as to the Church Defendants.

4. Defamation

The plaintiff asserts a claim of defamation against the Church Defendants, arguing that the petition circulated in opposition to his strip club "falsely imputed crimes of moral turpitude" to him. Filing 1 at 23. The Church Defendants move to dismiss, arguing that the petition did not constitute defamation. Filing 47 at 10.

Under Nebraska law, a claim of defamation requires "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Moats v. Republican Party of Nebraska*, 796 N.W.2d 584, 593 (Neb. 2011). But "when the plaintiff in a libel action is a public figure and the speech is a matter of public concern, the plaintiff must demonstrate 'actual malice,' which means knowledge of falsity or reckless disregard for the truth, by clear and convincing evidence." *Id.* at 593–94.

In a defamation suit, the threshold question is "whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion." *Steinhausen v. HomeServices of Nebraska, Inc.*, 857 N.W.2d 816, 828 (Neb. 2015). If a statement is merely one of subjective opinion, it is protected by the First Amendment and cannot be defamatory. *Id.* Under Nebraska law, distinguishing between fact and opinion is a question of law for the trial judge to decide based on the totality of the circumstances. *Id.* In making this determination, courts may consider all relevant factors, including: "(1) whether the general tenor of the entire work negates the impression that the defendant asserted an objective fact, (2) whether the defendant used figurative or hyperbolic language, and (3) whether the statement is susceptible of being proved true or false." *Id.*

***9** Context is also important to whether a reader would view a statement as one of fact or opinion: "where potentially defamatory statements are published in a public debate ... the audience may anticipate efforts by

the parties to persuade others of their positions by use of epithets, fiery rhetoric, or hyperbole," such that "language which generally might be considered as statements of fact may well assume the character of statements of opinion." *Moats*, 796 N.W.2d. at 596.

According to the plaintiff, the defamatory statement in the petition is: "A strip club would promote sexual violence, prostitution, a larger burden on the area law enforcement officials, and will tear down and destroy families and individuals." *See* filing 1 at 3, 23. The Court finds as a matter of law that no reasonable fact-finder could conclude that statement implies a provably false factual assertion, because the statement is not susceptible of being proved true or false. To begin with, the statement does not imply that the plaintiff's proposed strip club has actually caused any ill effects; rather, it predicts that it "would." A prediction about a possible future event is an opinion, not a factual assertion; even if the predicted event does not come to pass, the prediction itself is not "false" when made. *See, Maurer v. Town of Independence*, 45 F. Supp. 3d 535, 552–53 (E.D. La. 2014); *WCP/Fern Exposition Servs., LLC v. Hall*, Civil Action No. 3:08–CV–522, 2011 WL 1157699, at *13 (W.D. Ky. Mar. 28, 2011); *Rushman v. City of Milwaukee*, 959 F. Supp. 1040, 1044 (E.D. Wis. 1997); *Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. Ct. App. 2001). Additionally, the language in the statement is too vague to be proved false. It would be impossible to test by any objective measure whether a strip club would "promote" sexual violence or "tear down" families and individuals. *See Moats*, 796 N.W.2d at 597–98 (finding that vague statements that the plaintiff "mislead[s] creditors" and was not "doing financially well" were not susceptible of being proved false).

Because the plaintiff's defamation claim fails on the first prong, the Court will dismiss this claim against the Church Defendants.

5. Tortious interference with business relationships

The plaintiff alleges that the defendants have tortiously interfered with his business relationships. Filing 1 at 24. Specifically, he alleges that he had been in negotiations to purchase a property in Hall County for his strip club, but that as a result of the petition, the property owners refused to sell it to him. Filing 1 at 25. Additionally, he alleges that a strip club he owns in Buffalo County suffered "a decrease in patrons and sales" as a result of the petition. Filing 1 at 25. The Church Defendants move to dismiss on the basis of the *Noerr-Pennington* doctrine. Filing 47 at 13.

Under Nebraska law, the elements of tortious interference with a business relationship are: "(1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted." *Huff v. Swartz*, 606 N.W.2d 461, 466 (Neb. 2000) (quoting *Koster v. P & P Enters.*, 539 N.W.2d 274, 278–79 (Neb. 1995)).

The Eighth Circuit has held that the *Noerr-Pennington* doctrine applies in the context of a tortious interference claim. *South Dakota. v. Kansas City S. Indus., Inc.*, 880 F.2d 40, 52 (8th Cir. 1989). As explained above, the Church Defendants' alleged creation, circulation, and promotion of their petition is within the scope of *Noerr-Pennington*. Accordingly, the plaintiff's claim of tortious interference with a business relationship is dismissed as to the Church Defendants.

6. Infliction of emotional distress

***10** The plaintiff alleges that the defendants are liable to him for intentional infliction of emotional distress. Filing 1 at 26–27. He alleges that the petition and statements made in connection with the petition caused him "severe emotional and mental distress." Filing 1 at 26. The Church Defendants move to dismiss this claim, arguing that the First Amendment protects the statements in the petition, and that the statements do not rise to the level of "outrageous." Filing 47 at 14.

The elements of intentional infliction of emotional distress are: "(1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it." *Brandon ex rel. Estate of Brandon v. Richardson*, 624 N.W.2d 604, 620–21 (Neb. 2001).

The Free Speech Clause of the First Amendment can serve as a defense to this type of claim. *Snyder v. Phelps*, 562 U.S. 443, 451 (2011). Where the speech in question is of

"public concern," the First Amendment prohibits holding the speaker liable for it. *Id.* Determining whether speech is of public or private concern requires courts to examine the "'content, form, and context' of that speech." *Id.* at 453 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985)).

The content of the petition plainly relates to matters of public concern *See id.* at 454. It expresses opposition to a proposed strip club based on the possible effect it would have on crime, law enforcement, families, and individuals in Hall County. The form and context of the speech likewise demonstrate that it is on a matter of public concern; a petition circulated among the public and submitted to a governing body is a clear hallmark of "broad issues of interest to society at large." *See id.* at 454. And the fact that the petition mentioned the plaintiff by name does not transform the speech into one of private concern; it does not "change the fact that the overall thrust and dominant theme" of the petition "spoke to broader public issues." *See id.*

Accordingly, the Court concludes that the First Amendment protects the Church Defendants from liability for intentional infliction of emotional distress, and will dismiss that claim against the Church Defendants.

7. Negligence

Next, the plaintiff alleges that the defendants are liable for negligence against him. Filing 1 at 26. Specifically, he alleges that they were negligent in preparing the 2004 zoning resolution, in naming the plaintiff in their petition, in failing to consult with attorneys prior to circulating the petition, in attributing criminal conduct to plaintiff, and in allowing their employees and other representatives to circulate the petition. Filing 1 at 26–27. The Church Defendants move to dismiss on the grounds that the plaintiff has failed to allege facts that state a claim for negligence. Filing 47 at 15.

Under Nebraska law, "an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 784 N.W.2d 907, 915 (Neb. 2010). The plaintiff has not alleged that any of the defendants' conduct created such a risk. Nor has the plaintiff alleged facts establishing any sort of "special relationship" that could support a finding that the defendants owed the plaintiff a duty of care. *See id.* at 917. Rather, to the extent the plaintiff alleges that the defendants had some duty to refrain from acting as they did, those duties are embraced by his other claims for relief. In other words, what the plaintiff styles as his negligence claim is simply a recasting of those other claims for relief, adding the words "negligent, careless and reckless." *See e.g.* filing 1 at 26. The plaintiff has simply not pled a negligence claim, and the Court will dismiss this claim against the Church Defendants.

8. Negligent hiring, training, and supervision

***11** The plaintiff alleges that "Defendants were negligent, careless, and reckless in hiring, training, and supervising all individually named Defendants in this complaint, and all directors, supervisors, and employees, named herein, as such individuals are permitted and encouraged to engage in a custom and practice of unconstitutional conduct." Filing 1 at 23–24. The Church Defendants move to dismiss this claim on the grounds that the plaintiff has failed to allege facts supporting each of the elements of the claims. Filing 47 at 16.

Under Nebraska law, an underlying requirement in actions for negligent supervision and negligent training is that the employee is individually liable for a tort or guilty of a claimed wrong against a third person, who then seeks recovery against the employer. *Schieffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907, 913 (Neb. 1993). Similarly, an employer is liable for negligent hiring "for physical harm to third persons caused by his failure to exercise reasonable care in selecting an employee." *Kime v. Hobbs*, 562 N.W.2d 705, 713 (Neb. 1997).

As explained above, the plaintiff has not alleged facts giving rise to a plausible inference that the church employees are individually liable for any tort against him. Nor has the plaintiff alleged that the conduct of any of the defendants caused him physical injury. Thus, the Court will dismiss the plaintiff's claim for negligent hiring, training, and supervision against the Church Defendants.

In sum, each of the plaintiff's claims against the defendants Evangelical Free Church of Grand Island, Nebraska, and Third City Christian Church, shall be dismissed.

(c) Shay McGowan and Grand Island Dental Center

McGowan and the Grand Island Dental Center move to dismiss each of the plaintiff's claims against them under both Fed. R. Civ. P. 12(b)(6) and Nebraska's anti-SLAPP statute. Filing 57. Additionally, they request attorney's fees pursuant to the anti-SLAPP statute. Filing 58 at 19.

As described above, the complaint contains many generalized allegations that "Defendants" have all committed each of the purported wrongs. The Court has already explained why such generalized allegations fail to state a plausible claim for relief against any particular defendant. Only three portions of the complaint mention McGowan and the Dental Center by name. First, the complaint alleges that "defendant SHAY MCGOWAN told The Independent news that strip clubs, including that owned by Plaintiff, constitute the Felony of 'sex trafficking,' which is additionally defamatory." Filing 1 at 6. Next, the complaint identifies McGowan as a Nebraska resident who maintains a place of business in Grand Island. Filing 1 at 13. And finally, the complaint identifies Grand Island Dental Center as a non-incorporated domestic entity doing business in Grand Island. Filing 1 at 12.

The Court notes that, for the purposes of their motion to dismiss, McGowan and the Dental Center assume the complaint alleges they participated in the creation, circulation, or promotion of the petition. *See* filing 58 at 1. The complaint does not specifically assert these allegations against McGowan and the Dental Center. But even if it did, such allegations would be insufficient to state a plausible claim for relief against McGowan and the Dental Center for any involvement they may have had with the petition. Upon review of the complaint, the Court concludes that McGowan and the Dental Center stand in the same shoes as the Church Defendants with respect to any claims based on the petition—the plaintiff has not alleged any specific facts that would differentiate them. Consequently, for the same reasons the plaintiff failed to state a plausible claim for relief against the Church Defendants, the plaintiff has failed to state a plausible claim for relief against McGowan and the Dental Center with respect to any actions they may have taken regarding the petition.

***12** Thus, the Court turns to the question whether the allegation that "defendant SHAY MCGOWAN told The Independent news that strip clubs, including that owned by Plaintiff, constitute the Felony of 'sex trafficking,' which is additionally defamatory" states a plausible claim for relief against McGowan or the Dental Center. The Court concludes that it does not, because it lacks the level of specificity required by federal pleading standards.

The manner of setting forth allegations is a matter of procedure, not substance, meaning that when a federal court exercises jurisdiction over state law claims, federal pleading rules apply. *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 698–99 (8th Cir. 1979). In the Eighth Circuit, an allegation that a defendant has made a defamatory statement must be sufficiently specific to allow the defendant "to form responsive pleadings." *See Freeman v. Bechtel Const. Co.*, 87 F.3d 1029, 1031 (8th Cir. 1996) (quoting *Asay*, 594 F.2d at 699). In most cases, "the use of *in haec verba* pleadings on defamation charges is favored" because "generally knowledge of the exact language used is necessary to form responsive pleadings." *Asay*, 594 F.2d at 699; *Holliday v. Great Atl. & Pac. Tea Co.*, 256 F.2d 297, 302 (8th Cir. 1958) ("In an action for slander or libel the words alleged to be defamatory must be pleaded and proved.").

Here, the plaintiff has failed to identify the exact content of the statement allegedly made. For instance, it is unclear whether McGowan specifically said that the plaintiff has committed felony sex trafficking, or whether he was discussing strip clubs generally, or whether he was making a prediction about the effect of the proposed strip club, if it were to be opened in Hall County. Which particular statement is alleged could significantly alter the types of defenses that may be available to McGowan. Nor does the complaint contain information regarding the context of the alleged statement, the date the statement was allegedly made, or whether the statement was published to others. This lack of clarity is even more pronounced given the plaintiff's propensity to plead legal conclusions in lieu of factual allegations—it is simply impossible to discern whether the allegation is meant to be a literal transcription of the statement made, or whether it represents the plaintiff's attempt to persuasively characterize the statement. Accordingly, the Court concludes that this allegation is insufficiently specific to allow the defendant to form responsive pleadings.

In sum, the Court dismisses all claims against McGowan and the Dental Center. As such, the Court need not reach McGowan's and the Dental Center's special motion

to dismiss based on Nebraska's anti-SLAPP statute. McGowan and the Dental Center may assert their request for attorney's fees by motion pursuant to Fed. R. Civ. P. 54.

(d) Hall County Defendants

The defendants Hall County Board of Supervisors, Hall County, Chad Nabity, Scott Arnold, Gary Quandt, Jane Richardson, Doug Lanfear, and Pam Lancaster (collectively, "County Defendants") move to dismiss each of the plaintiff's claims against them, on various grounds. Filing 73.

The Court has already noted that the complaint generally alleges that all of these defendants have committed all of the alleged wrongdoing. As the Court has explained, generalized allegations and legal conclusions are insufficient to state a plausible claim for relief against any particular defendant. Accordingly, the Court will consider only those portions of the complaint that specifically allege wrongdoing on the part of one or more of the County Defendants.

***13** Those allegations are as follows. First, the complaint alleges that defendant Hall County Board of Supervisors adopted and enforces a zoning resolution that restricts adult oriented business to industrial districts constituting less than 0.1% of the entire county, and precludes such businesses from operating between 12 a.m. and 6 a.m. Filing 1 at 2. Next, the complaint alleges that defendant Chad Nabity, the regional planning director of Hall County, told a newspaper that "we have places where it can be done" and that "the Plaintiff could open a club in a 'manufacturing or commercially zoned area in Grand Island.'" Filing 1 at 3. Then, the complaint alleges that the Hall County Board of Supervisors held a public hearing, without providing the plaintiff notice or an opportunity to be heard, on the petition opposing the plaintiff's plan to open a strip club in Hall County. Filing 1 at 3. Next, the complaint alleges that at that hearing, defendant Pam Lancaster, a member of the Board of Supervisors, stated, "It really is vital that people—who believe in the Christian basis of life stand for them ... I'm of a similar mind as well." Filing 1 at 7 (alteration in original). Finally, the complaint alleges that at the hearing the defendant Doug Lanfear, a member of the Board of Supervisors, stated, "I want to thank you for bringing your Christian values to the forefront ... I want to thank you for getting this petition." Filing 1 at 7 (alteration in original). The complaint also identifies all of the County Defendants: Hall County is a county in Nebraska; the Hall County Board of Supervisors is Hall County's local governing entity; Gary Quandt, Jane Richardson, Doug Lanfear, and Pam Lancaster are all Hall County supervisors; Scott Arnold is the Hall County board chairman; and Chad Nabity is the Hall County regional planning director. Filing 1 at 11–12.

1. Free Speech Clause violations and standing

The Court will take the County Defendants' arguments out of order to facilitate efficient resolution of the parties' arguments. First, the plaintiff alleges that "Defendants' zoning resolution and petition" violate the First Amendment by "unlawfully infringing upon Plaintiff's protected speech." Filing 1 at 18. The complaint alleges no facts indicating the County Defendants participated in creating, circulating, or promoting the petition. Accordingly, the Court will consider whether the complaint has stated a plausible claim for relief with respect to the County Defendants' involvement in promoting or enforcing the zoning resolution. The County Defendants argue that the plaintiff lacks standing to bring constitutional challenges to Hall County's zoning regulations. Filing 76 at 9.

Federal courts have subject-matter jurisdiction only over cases in which the plaintiff "satisf[ies] the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). In other words, federal courts have no jurisdiction over cases in which the plaintiff lacks standing to bring the complaint. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Standing has three components. First, plaintiffs must show that they have suffered an injury-in-fact that is both concrete in nature and particularized to them. *Allen v. Wright*, 468 U.S. 737, 755 (1984). Second, the injury must be fairly traceable to defendants' conduct. *Id.* at 757. Third, the injury must be redressable—relief "must be 'likely' to follow from a favorable decision." *Id.*

In addition to these constitutional standing requirements, the Supreme Court has adopted certain prudential standing requirements—requirements that are not constitutionally mandated, but that ensure federal courts do not decide abstract or hypothetical questions. *See City*

of Chicago v. Morales, 527 U.S. 41, 55 n.22 (1999). One of these is the third-party standing rule, which holds that one party generally may not assert the constitutional rights of another, except in certain specific circumstances. *Singleton v. Wulff*, 428 U.S. 106, 113 (1976).

Initially, the plaintiff argues that the requirement to show standing should be relaxed in this case, because he has asserted a First Amendment challenge to the zoning ordinance. And the Supreme Court "has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)). But this exception relates only to the prudential third-party standing rule—it allows someone injured by a statute to challenge it on the basis that it violates some other person's rights. It does not obviate the need for *constitutional* standing. In other words, even if the exception would allow the plaintiff to raise the constitutional rights of third parties, he still must demonstrate that he himself has suffered an injury-in-fact that is traceable to the statute and would be redressed by a decision in his favor.

***14** Here, although the plaintiff has challenged the zoning ordinance on First Amendment grounds, the defect he complains of is not that the zoning ordinance is too imprecise, overbroad, or vague, such that it chills free speech. Accordingly, the exception does not apply. And even if it did, it would not excuse the plaintiff from the need to establish each of the three requirements of constitutional standing.

To establish constitutional standing in the context of challenging a zoning ordinance, a plaintiff "must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention." *Warth v. Seldin*, 422 U.S. 490, 508 (1975). The plaintiff need not have a "present contractual interest in a particular project." *Id.* at 508 n.18. But the plaintiff must allege facts from which it reasonably could be inferred that, absent the restrictive zoning ordinance, "there is a substantial probability that [he] would have been able to purchase or lease in" the area subject to the ordinance, "and that, if the court affords the relief requested, the asserted inability of [the plaintiff] will be removed." *Id.* at 503.

Thus, for example, plaintiffs have standing to challenge "zoning restrictions as applied to particular projects that would supply housing within their means, and of which they were intended residents," because they are "able to demonstrate that unless relief from assertedly illegal actions was forthcoming, their immediate and personal interests would be harmed." *Id.* at 507.

But plaintiffs lack standing to challenge a zoning ordinance where they have no present interest in property affected by the ordinance, where they have not been denied a variance or permit by officials, and where they have not demonstrated any indication that if the zoning ordinance were to be stricken down, there would be property that would "satisf[y] [their] needs at prices they could afford." *Id.* at 507. In other words, there is no standing where the plaintiffs fail to allege facts suggesting that "were the court to remove the obstructions attributable to respondents, such relief would benefit" them. *Id.*

Here, the plaintiff has alleged that the zoning ordinance has restricted his ability to find a suitable location for his proposed strip club. However, he has not alleged that, were the zoning ordinance to be released, he would be able to purchase or lease land suitable for the club. Indeed, his complaint asserts that "no individual or entity will enter into a sale or lease contract with Plaintiff as the defamatory petition has destroyed Plaintiff's reputation to the extent that no one in Hall County will sell or lease Plaintiff property for his business." Filing 1 at 7. In short, the facts alleged "fail to support an actionable causal relationship" between the zoning ordinance and the plaintiff's inability to find a suitable location for his strip club in Hall County. *See Warth*, 422 U.S. at 507. Accordingly, the plaintiff lacks standing to challenge the constitutionality of the zoning ordinance, and the Court has no jurisdiction over such a challenge. Thus, the Court will dismiss the plaintiff's claim that the County Defendants violated the Free Speech Clause of the First Amendment. And to the extent any of the plaintiff's other claims are based on his objections to the constitutionality of the zoning ordinance, those claims are dismissed as well.

2. Establishment Clause violations

***15** Next, the County Defendants move to dismiss the plaintiff's claim under § 1983 alleging they have violated the Establishment Clause. Filing 76 at 6. They argue that none of the County Defendants' actions constitute official government action, and that even if they did, those actions did not violate the Establishment Clause. Filing 76 at 9.

It is somewhat unclear from the complaint what conduct specifically the plaintiff believes violated the Establishment Clause. However, the plaintiff's briefing clarifies that his claim is based on the zoning resolution and on the statements that Lancaster and Lanfear made at the public hearing. *See* filing 84 at 14. As the Court has explained, it has no jurisdiction over constitutional challenges to the zoning ordinance, Accordingly, it shall limit its inquiry to whether, as a matter of law, Lancaster and Lanfear's alleged statements might constitute a violation of the Establishment Clause.

The purpose of the Establishment Clause is to "prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). However, it "do[es] not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." *Id.* Indeed, the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). There is no *per se* rule for deciding when government action violates the Establishment Clause. *Id.* at 678. Rather, the Supreme Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." *Id.* at 679; *see also Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (acknowledging that no single test fully delineates the contours of the Establishment Clause).

It is clear that not all invocations of religion in a government sphere constitute violations of the Establishment Clause. *See id.* at 675–76 (listing numerous ways in which the government has acknowledged the role of religion in American life). For instance, the Supreme Court found no Establishment Clause violation when a town invited a predominantly Christian set of ministers to open town meetings with prayer. *Town of Greece, N. Y. v. Galloway*, 134 S. Ct. 1811, 1824 (2014). Such a practice was acceptable because the town did not compel its citizens to participate in the prayer, because the town did not discriminate against any religious group in deciding who would lead the prayer, and because the prayer had the secular purpose of "invit[ing] lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing." *Id.* at 1823–24. In reaching its conclusion, the Court noted that "willing participation in civic affairs can be consistent with a brief acknowledgement of ... belief in a higher power, always with due respect for those who adhere to other beliefs." *Id.* at 1827–28.

Similarly, the Eighth Circuit found no violation of the Establishment Clause where the Board of Education in a small town in Missouri enforced a rule prohibiting school dances. *Clayton by Clayton v. Place*, 884 F.2d 376, 380–81 (8th Cir. 1989). The decision to retain the prohibition came after a board meeting at which several members of the public expressed religious views on the matter. *Id.* at 380. In addition, several members of the board indicated that their individual religious beliefs favored the rule. *Id.* But the Eighth Circuit found that these circumstances were insufficient to render an otherwise-acceptable government action unconstitutional, holding that "[t]he mere fact a governmental body takes action that coincides with the principles or desires of a particular religious group ... does not transform the action into an impermissible establishment of religion." *Id.* It further explained, "We simply do not believe elected government officials are required to check at the door whatever religious background (or lack of it) they carry with them ...." *Id.*

***16** Here, Lancaster allegedly said, "It really is vital that people—who believe in the Christian basis of life stand for them ... I'm of a similar mind as well." Filing 1 at 7. And Lanfear allegedly stated, "I want to thank you for bringing your Christian values to the forefront ... I want to thank you for getting this petition." Filing 1 at 7. These statements constitute mere brief acknowledgments of the role of religion in society or, at most, expressions of individual religious belief. Indeed, they are considerably less religion-promoting than the actions held to be constitutional in *Town of Greece* and *Clayton*. And the Board took no other actions suggesting that these statements were part of some broader pattern of behavior meant to promote a particular religious worldview: the Board took no official action on the petition, did not prohibit the plaintiff from opening a club

in Hall County, and did not indicate that it would refuse input from those with other religious views. Accordingly, the Court finds as a matter of law that the plaintiff's allegations fail to state a plausible claim that the County Defendants violated the Establishment Clause.

3. Equal Protection Clause violations

Next, the County Defendants move to dismiss the plaintiff's claim that they have violated the Equal Protection Clause of the Fourteenth Amendment. Filing 76 at 18. The plaintiff alleges that the petition, and the County Defendants' alleged endorsement of it at the public hearing, violated the Equal Protection Clause by treating him as a "class of one." Filing 1 at 20–21.

The Equal Protection Clause requires that the government treat all similarly situated people alike. *Barstad v. Murray Cty.*, 420 F.3d 880, 884 (8th Cir. 2005). The Supreme Court recognizes an equal protection claim for discrimination against a "class of one." *Id.* (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). The purpose of a class-of-one claim is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination. *Id.* A class-of-one claimant may prevail by showing he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.*

The plaintiff has alleged no *facts* here that would allow the Court to infer either disparate treatment or that such treatment was intentional. The plaintiff does not identify any other individuals who are "similarly situated," nor explain what "similarly situated" means in this context—meaning that the plaintiff has not actually identified any disparate treatment to which he has been subjected. *See Johnson v. City of Minneapolis*, 152 F.3d 859, 862 (8th Cir. 1998). Accordingly, the Court will dismiss the plaintiff's Equal Protection claim against the County Defendants.

4. Due Process Clause violations

Next, the plaintiff alleges that the County Defendants have violated his rights under the Due Process Clause of the Fourteenth Amendment by holding a hearing regarding his proposed strip club without providing him notice or an opportunity to be heard. The County Defendants move to dismiss on the grounds that the plaintiff has been deprived of no protected liberty or property interest. Filing 76 at 19.

To assert a claim for violation of procedural due process, the plaintiff must allege "(1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest." *Stevenson v. Blytheville Sch. Dist. #5*, 800 F.3d 955, 965–66 (8th Cir. 2015).

As the Court understands it, the plaintiff alleges that he was deprived of a protected property interest when, at the hearing, the defendants expressed "their intention to deny Plaintiff a conditional use permit" for his intended strip club. Filing 1 at 22. The County Defendants argue that the plaintiff has no property interest in any conditional use permit, and that even if he did, he has not been deprived of such interest. Filing 76 at 19.

A plaintiff has "a constitutionally cognizable property interest in a right or a benefit" if he has "a legitimate claim of entitlement to it." *Stevenson*, 800 F.3d at 967–68 (internal quotations omitted) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). To have a legitimate claim of entitlement to a benefit, "a person clearly must have more than an abstract need or desire and more than a unilateral expectation of it." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (internal quotations omitted). The Due Process Clause itself does not itself create such entitlements; rather, they arise "from an independent source such as state law." *Id.*

***17** Assuming *arguendo* that the plaintiff has a "legitimate claim of entitlement" to a conditional use permit, he has not been deprived of that benefit. All he alleges is that "Defendants" (he does not identify which ones) expressed their *intention* to deny him a conditional use permit. The plaintiff fails to allege even that he has applied or will apply for a conditional use permit. Thus, the plaintiff has failed to state a plausible claim for relief that the County Defendants violated the Due Process Clause, and that claim will be dismissed.

5. Anti-trust Violations

The plaintiff next alleges that the County Defendants have violated anti-trust laws because they "control, regulate and dictate policies for zoning and conditional use permits" in Hall County. Filing 1 at 18. The County Defendants move to dismiss, asserting both that the

plaintiff has failed to allege facts establishing a monopoly exists, and that they are entitled to *Parker* immunity. Filing 76 at 11–13.

As explained above, the Court construes the plaintiff's complaint as bringing a single cause of action under §§ 4 and 16 of the Clayton Act on the basis of alleged violations of §§ 1 and 2 of the Sherman Act. Section 1 of the Sherman Act, 15 U.S.C. § 1, makes unlawful "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." And § 2 of the Sherman Act, 15 U.S.C. § 2, makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."

The Supreme Court has held that the Sherman Act does not apply to anticompetitive restraints imposed by the states "as an act of government." *Parker v. Brown*, 317 U.S. 341, 352 (1943). Although *Parker* immunity does not apply directly to local governments—such as county governments—the Supreme Court has held that a local government's "restriction of competition may sometimes be an authorized implementation of state policy, and [has] accorded *Parker* immunity where that is the case." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 370 (1991). For the action of a local government to be "an authorized implementation of state policy," the local government must have both the authority to regulate, and the "authority to suppress competition." *Id.* at 370, 372.

A local government has authority to regulate where the state has delegated to the local government the power to enact the regulation in question. Here, the Hall County Board of Supervisors clearly had authority to regulate under Neb. Rev. Stat. § 23-114, which expressly gives county boards the power to adopt zoning resolutions.

A local government has the authority to suppress competition if there is a "'clear articulation of a state policy to authorize anticompetitive conduct' by the municipality in connection with its regulation." *Omni Outdoor*, 499 U.S. at 372 (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985)). The Supreme Court has "rejected the contention that this requirement can be met only if the delegating statute explicitly permits the displacement of competition." *Id.* Rather, it is sufficient to show that "suppression of competition is the 'foreseeable result' of what the statute authorizes." *Id.* at 373 (quoting *Hallie*, 471 U.S. at 42). Where a local government has acted pursuant to its power to adopt zoning resolutions, that condition is "amply met," because "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition." *Id.*

***18** Accordingly, the Court finds that the County Defendants are immune from liability for anti-trust violations, because the zoning resolution adopted by the Hall County Board of Supervisors was "an authorized implementation of state policy." *See Omni Outdoor*, 499 U.S. at 370. The Court additionally notes that the plaintiff has also alleged that "Defendants enforce their monopoly and restraint of trade through boycotts, blacklists and concerted refusals to deal with Plaintiff." Filing 1 at 18. This contention is unsupported by specific factual allegations, and is therefore insufficient to state a plausible claim for relief. Thus, the anti-trust claims against the County Defendants will be dismissed.

6. Defamation

Next, the County Defendants move to dismiss the plaintiff's state law defamation claim against them on several grounds. *See* filing 76 at 31–34. In part, the County Defendants argue that they are immune from suit for claims of defamation. Filing 76 at 32.

Under Neb. Rev. Stat. § 13-902, a political subdivision and its employees are immune from tort claims except as provided by the Political Subdivisions Tort Claims Act (PSTCA), Neb. Rev. Stat. § 13-901, et seq. The PTSCA specifies that it does not waive immunity for "[a]ny claim arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." Neb. Rev. Stat. § 13-910(7).

The County Defendants are clearly immune from the plaintiff's claim of defamation—libel and slander are on the list of torts for which Nebraska has not waived immunity. Accordingly, these claims will be dismissed against the County Defendants.

7. Interference with business relationships

Next, the County Defendants move to dismiss the plaintiff's state law tortious interference with business

relationships claim, mostly repeating the same arguments they made with respect to the defamation claim. *See* filing 76 at 34. And as with defamation, the County Defendants are immune from claims of tortious interference with business relationships. This claim arises from "interference with contract rights," one of the torts for which Nebraska has not waived sovereign immunity. *See Teetor v. Dawson Pub. Power Dist.*, 808 N.W.2d 86, 94–95 (Neb. 2012). Accordingly, this claim will be dismissed against the County Defendants.

8. Infliction of emotional distress

Next, the County Defendants move to dismiss the plaintiff's infliction of emotional distress claim on several grounds. In part, the County Defendants contend that the plaintiff has failed to allege facts giving rise to a plausible claim for relief for intentional infliction of emotional distress. Filing 76 at 41.

To recover for intentional infliction of emotional distress under Nebraska law, a plaintiff must prove (1) intentional or reckless conduct (2) that was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it. *Roth v. Wiese*, 716 N.W.2d 419, 431 (Neb. 2006).

Here, the plaintiff alleges that he has suffered emotional distress as a result of "Defendants' petition and the statements made in conjunction with its circulation, distribution, and publication." Filing 1 at 26. Presumably, the statements complained of include the comments Lanfear and Lancaster made at the public hearing. While the plaintiff has alleged intentional conduct, that conduct was clearly not atrocious or intolerable. *See Roth*, 716 N.W.2d at 431. Nor has the plaintiff sufficiently alleged facts showing emotional distress so severe that no reasonable person should be expected to endure it. *Id.* Thus, the Court will dismiss this claim against the County Defendants.

9. Negligence

***19** The County Defendants next move to dismiss the plaintiff's negligence claim against them for various reasons, including because the plaintiff has failed to allege that the Defendants owed him a duty. Filing 76 at 40. The plaintiff has alleged generally that "Defendants" have committed several acts of negligence against him. Filing 1 at 26. The only allegations that appear to apply to the County Defendants is that they "were negligent, careless and reckless in preparing, adopting, and enforcing their zoning resolution." Filing 1 at 26.

As explained above with respect to the Church Defendants, under Nebraska law, "an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm" or when the facts establish a special relationship giving rise to a tort duty. *See A.W.*, 784 N.W.2d at 915. The plaintiff has not alleged that any of the defendants' conduct created such a risk. Rather, to the extent the plaintiff alleges that the defendants had some duty to refrain from acting as they did, those duties are embraced by his other claims for relief. Accordingly, the Court will dismiss the negligence claim against the County Defendants.

10. Negligent hiring, supervision, and training

As explained previously with respect to the church defendants, under Nebraska law, "an underlying requirement in actions for negligent supervision and negligent training is that the employee is individually liable for a tort or guilty of a claimed wrong against a third person, who then seeks recovery against the employer." *Schieffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907, 913 (Neb. 1993). As set forth above, the plaintiff has not alleged facts giving rise to a plausible inference that any of the County Defendants could be individually liable for committing any tort against him. Thus, the Court will dismiss the plaintiff's claim for negligent hiring, training, and supervision against the County Defendants.

In sum, the Court will dismiss all claims against the County Defendants. As such, the Court need not reach the County Defendants' motion to dismiss under the anti-SLAPP statute, or any of their other arguments in support of dismissal.

3. MOTIONS TO AMEND AND CONSOLIDATE

(a) Motion to Consolidate and Amend

The plaintiff moved to consolidate this suit with another suit he has brought against Seward County, and to

amend his complaint (filing 78). He subsequently filed a new motion to amend, consolidate, and join parties (filing 114), and withdrew his first motion to amend and consolidate. Filing 114 at 2. Accordingly, the plaintiff's first motion to amend and consolidate is denied as moot.

(b) Motion to Amend

The plaintiff has renewed his request to consolidate this case with the Seward County case, and moved to amend his complaint. *See* filing 114 at 2.

1. Consolidation

The plaintiff previously moved to consolidate this lawsuit with a separate lawsuit he brought against Seward County and other defendants (4:15-CV-3068). Filing 78. He renews that request here. Filing 114 at 2. In essence, his complaint in the Seward County case alleges that Seward County, the Seward County Board of Commissioners, the Seward County Attorney, and several individuals serving as Seward County Commissioners violated his rights by adopting a zoning ordinance limiting his ability to open an adult entertainment venue in that county.

Under Fed. R. Civ. P. 42(a), "If actions before the court involve a common question of law or fact, the court may ... consolidate the actions." "Consolidation is inappropriate, however, if it leads to inefficiency, inconvenience, or unfair prejudice to a party." *EEOC v. HBE Corp.*, 135 F.3d 543, 551 (8th Cir. 1998). District courts have broad discretion to decide whether to consolidate an action. *Enter. Bank v. Saettele*, 21 F.3d 233, 235 (8th Cir. 1994).

***20** Here, these two cases rely on completely different sets of facts. One relates to actions taken by various individuals and entities in Hall County, and one relates to actions taken by different individuals and entities in Seward County. The two cases will, therefore, require different, individualized proof based on the unique factual circumstances in each. And although there are a few common questions of law, there are also several significant legal issues that are unique to each case. Accordingly, the Court concludes that consolidation would be impractical and inappropriate here, and it will deny the plaintiff's request to consolidate.

2. Amendment

The plaintiff has moved to amend his complaint under Fed. R. Civ. P. 15(a)(2), which allows amendment before trial "only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." But "there is no absolute right to amend and a finding 'undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment' may be grounds to deny a motion to amend." *Doe v. Cassel*, 403 F.3d 986, 990–91 (8th Cir. 2005) (quoting *Becker v. Univ. of Neb. at Omaha*, 191 F.3d 904, 908 (8th Cir. 1999)). The opposing parties have not consented to the plaintiff's proposed amended complaint.

The Court finds that, in light of the above analysis, the plaintiff's amended complaint suffers from many of the same deficiencies that warranted dismissal of most of the claims in the original complaint. In other words, the proposed amended complaint would be futile. But the Court will grant the plaintiff leave to file a new motion to amend, provided that his new proposed amended complaint takes into consideration the principles and analysis set forth above. The Court further notes that, to the extent the plaintiff believes there are claims in his current proposed amended complaint that could survive a motion to dismiss, he may reassert those claims in his next proposed amended complaint.

(c) Motion to file notice of motion nunc pro tunc

Finally, the plaintiff has filed a motion (filing 127) requesting leave to file a notice of motion nunc pro tunc or alternatively allow him to refile the proposed amended complaint, and requesting that the Court stay its decision regarding Hall County's motion to dismiss and compel early disclosure by Hall County. As the Court understands it, this motion is an attempt to correct certain technical deficiencies in the plaintiff's earlier motions to amend. Because the Court has already denied those motions to amend on the merits, this motion to file a notice of motion nunc pro tunc will be denied as moot. Additionally, because the posture of this case has changed significantly as a result of this order, the Court denies the remainder of the motion as moot without prejudice to reassertion before the Magistrate Judge.

IT IS ORDERED:

1. The motion to strike (filing 111) filed by defendants Third City Christian Church and Evangelical Free Church of Grand Island, Nebraska is granted. The Clerk of the Court is directed to strike filings 85, 90, 91, 92, 93, 96, 97, 98, and 99.

2. The defendant Kent Mann's motion to dismiss (filing 69) is granted. All claims asserted against Kent Mann are dismissed.

3. The motion to dismiss (filing 46) filed by defendants Third City Christian Church and Evangelical Free Church of Grand Island, Nebraska is granted. All claims asserted against Third City Christian Church and Evangelical Free Church of Grand Island, Nebraska are dismissed.

4. The motion to dismiss (filing 57) filed by Shay McGowan and the Grand Island Dental Center is granted. All claims asserted against McGowan and the Grand Island Dental Center are dismissed.

***21** 5. The motion to dismiss (filing 73) filed by Hall County Board of Supervisors, Hall County, Chad Nabity, Scott Arnold, Gary Quandt, Jane Richardson, Doug Lanfear, and Pam Lancaster is granted. All claims asserted against Hall County Board of Supervisors, Hall County, Chad Nabity, Scott Arnold, Gary Quandt, Jane Richardson, Doug Lanfear, and Pam Lancaster are dismissed.

6. The plaintiff's first motion to consolidate and amend (filing 78) is denied as moot.

7. The plaintiff's second motion to consolidate and amend (filing 114) is denied.

8. The plaintiff's motion to file notice of motion nunc pro tunc or alternatively refile the proposed amended complaint, and to stay the Court's decision regarding Hall County's motion to dismiss and compel early disclosures by Hall County (filing 127) is denied.

9. The plaintiff may file a new motion to amend his complaint by April 21, 2016, provided that his proposed amended complaint takes into consideration the principles and analysis set forth above. To the extent the plaintiff believes there are any claims or allegations in his previously filed proposed amended complaint that could survive a motion to dismiss, he may reassert those claims and allegations.

All Citations

Slip Copy, 2016 WL 1274534

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238 Ariz. 36
Court of Appeals of Arizona,
Division 1.

Angela RODRIGUEZ, as the parent and guardian of JoDon R., Jr., Frank R., and Noah R., Minors, Plaintiff/Appellant,
v.
FOX NEWS NETWORK, L.L.C., a foreign limited liability company, Defendant/Appellee.

No. 1 CA–CV 14–0437.
|
Aug. 4, 2015.

Synopsis

Background: Mother brought action on behalf of her children for negligent and intentional infliction of emotional distress against television news network, which aired live broadcast of high-speed police chase involving children's father, and which showed father's suicide at conclusion of the chase. Network moved to dismiss on ground that it was protected under the First Amendment. The Superior Court, Maricopa County, No. CV2013–008467, John Christian Rea, J., granted network's motion. Mother appealed.

[Holding:] The Court of Appeals, Johnsen, J., held that the broadcast addressed a matter of public concern, and thus network was protected from liability under First Amendment.

Affirmed.

Attorneys and Law Firms

****324** Robbins & Curtin, PLLC By Joel B. Robbins, Anne E. Findling, Phoenix, Co–Counsel for Plaintiff/Appellant.

Knapp & Roberts, PC By David L. Abney, Scottsdale, Co–Counsel for Plaintiff/Appellant.

Ballard Spahr, LLP By David J. Bodney, Christopher Moeser, Phoenix, Counsel for Defendant/Appellee.

Judge DIANE M. JOHNSEN delivered the opinion of the Court, in which Presiding Judge PATRICIA K. NORRIS and Judge KENT E. CATTANI joined.

OPINION

JOHNSEN, Judge:

***38** ¶ 1 An armed carjacking suspect led police on a high-speed chase that ended abruptly when he got out of the vehicle, put a handgun to his head and shot himself. After Fox News Networks, LLC, broadcast the chase and the suicide live, the two teenage sons of the suspect learned their father had killed himself when they saw a clip of the broadcast on the Internet a few hours later. Their mother sued Fox on their behalf, alleging negligent and intentional infliction of emotional distress. The superior court granted Fox's motion to dismiss. Because the First Amendment bars the tort claims, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶ 2 After stealing a car at gunpoint in west Phoenix, JoDon Romero led police on an 80–mile chase, at one point firing gunshots at officers in pursuit. He made his way to Interstate 10, then weaved in and out of traffic at speeds reportedly exceeding 100 miles an hour before pulling off the freeway near Salome. Several news organizations covered the chase. The local Fox affiliate videotaped it from a news helicopter, and Fox aired the video live during a national broadcast of *Studio B with Shepard Smith.* Although Fox's normal practice is to use a short video delay that allows it to cut away from a violent scene, it did not do so here, and viewers saw Romero fire the handgun and crumple to the ground. The Fox anchor immediately apologized for showing the suicide.

¶ 3 Romero was the father of three boys who were in school during the incident. After hearing at school about a suicide video, and unaware it involved their father, the two older boys searched for the video online when they got home. They found a clip of the Fox newscast on YouTube, and as they watched, they realized the carjacking suspect who shot himself was their father.

¶ 4 Angela Rodriguez, their mother, sued Fox on behalf of the boys, alleging the video severely traumatized them.

Fox moved to dismiss, arguing, *inter alia,* that the First Amendment protected it from liability. The superior court granted the motion. We have jurisdiction of the timely appeal pursuant to Arizona Revised Statutes section 12–2101(B) (2015). [1]

1 Absent material revision after the date of the events at issue, we cite a statute's current version.

DISCUSSION

A. Standard of Review.

[1] [2] ¶ 5 We review *de novo* the dismissal of a complaint for failure to state a claim, *Coleman v. City of Mesa,* 230 Ariz. 352, 355, ¶ 7, 284 P.3d 863, 866 (2012), and will affirm only if a plaintiff "would not be entitled to relief under any facts susceptible of proof in ***39 **325** the statement of the claim," *Mohave Disposal, Inc. v. City of Kingman,* 186 Ariz. 343, 346, 922 P.2d 308, 311 (1996). In determining whether a complaint states a claim upon which relief can be granted, we "assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen v. Auto–Owners Ins. Co.,* 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008).

[3] ¶ 6 A complaint that implicates freedom of the press under the First Amendment, however, requires close scrutiny. *AMCOR Inv. Corp. v. Cox Ariz. Publ'ns, Inc.,* 158 Ariz. 566, 568, 764 P.2d 327, 329 (App.1988) ("[W]hen the complaint implicates the fundamental value of freedom of the press, there is good reason for a court to examine the complaint with a more rigorous eye in order not to burden public debate with insupportable litigation."). Close review of such a complaint advances "the public's significant interest in protecting the press from the chill of meritless ... actions." *Scottsdale Publ'g Inc. v. Superior Court,* 159 Ariz. 72, 74, 764 P.2d 1131, 1133 (App.1988).

B. The First Amendment Defense to Claims for Intentional or Negligent Infliction of Emotional Distress.

[4] [5] ¶ 7 The tort of intentional infliction of emotional distress requires proof of the following elements:

> *[F]irst,* the conduct by the defendant must be "extreme" and "outrageous"; *second,* the defendant must either intend to cause emotional distress or recklessly disregard the near certainty that such distress will result from his conduct; and *third,* severe emotional distress must indeed occur as a result of defendant's conduct.

Ford v. Revlon, Inc., 153 Ariz. 38, 43 [734 P.2d 580, 585] (1987). The tort of negligent infliction of emotional distress requires a showing that the plaintiff witnessed an injury to a closely related person, suffered mental anguish manifested as physical injury, and was within the zone of danger so as to be subjected to an unreasonable risk of bodily harm created by the defendant. *Pierce v. Casas Adobes Baptist Church,* 162 Ariz. 269, 272 [782 P.2d 1162, 1165] (1989).

¶ 8 We assume *arguendo* that the complaint stated these common-law claims. Like the superior court, we will address Fox's constitutional defense so as to protect First Amendment rights and avoid a "prolonged, costly, and inevitably futile trial." *Citizen Publ'g Co. v. Miller,* 210 Ariz. 513, 516, ¶ 9, 115 P.3d 107, 110 (2005) (quoting *Scottsdale Publ'g,* 159 Ariz. at 74, 764 P.2d at 1133).

[6] ¶ 9 The First Amendment, made applicable to the states by the Due Process Clause of the Fourteenth Amendment, "can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress." *Snyder v. Phelps,* 562 U.S. 443, 451, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011); *see, e.g., Citizen Publ'g Co.,* 210 Ariz. at 517, ¶ 12, 115 P.3d at 111. In *Snyder,* the Supreme Court addressed speech that, like the broadcast here, had the power to "inflict great pain." 562 U.S. at 461, 131 S.Ct. 1207. Members of a church used the occasion of the funeral of a young Marine to picket with signs reflecting their "view that the United States is overly tolerant of sin and that God kills American soldiers as punishment." *Id.* at 447, 131 S.Ct. 1207. Acknowledging that the signs were "particularly hurtful" to the mourners, *id.* at 456, 131 S.Ct. 1207, the Court nevertheless held the First Amendment protected the church members from state tort claims because their speech was a matter of public concern, *id.* at 461, 131 S.Ct. 1207.

[7] [8] [9] ¶ 10 Speech on matters of public concern "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Id.* at 452, 131 S.Ct. 1207 (quoting *Connick v. Myers,* 461 U.S. 138, 145, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)). "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine v. Falwell,* 485 U.S.

46, 50, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). Speech involving purely private matters, by contrast, receives less First Amendment protection. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 759, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985). "That is because restricting speech on purely private ***40** ****326** matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: '[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas'; and the 'threat of liability' does not pose the risk of 'a reaction of self-censorship' on matters of public import." *Snyder,* 562 U.S. at 452, 131 S.Ct. 1207 (quoting *Dun & Bradstreet,* 472 U.S. at 760, 105 S.Ct. 2939).

[10] ¶ 11 In *Snyder,* the Court observed that the principles determining when speech is of public concern "accord broad protection to speech to ensure that courts themselves do not become inadvertent censors." 562 U.S. at 452, 131 S.Ct. 1207. The Court continued:

> Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."

Id. at 453, 131 S.Ct. 1207 (citations omitted). The Court explained that determining "whether speech is of public or private concern requires us to examine the 'content, form and context' of that speech, 'as revealed by the whole record.' " *Id.* (quoting *Dun & Bradstreet,* 472 U.S. at 761, 105 S.Ct. 2939). In this analysis, a court must independently examine the entire record "to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Id.* (quoting *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)).

[11] ¶ 12 Applying that analysis here, the Fox broadcast clearly addressed a matter of public concern. The "content" of the broadcast depicted a police chase of an armed suspect who had fired at officers and demonstrated great disregard for the safety of others. The public has a strong interest in monitoring the manner in which law enforcement responds to criminal behavior. *See, e.g., Godbehere v. Phoenix Newspapers, Inc.,* 162 Ariz. 335, 343, 783 P.2d 781 (1989) ("It is difficult to conceive of an area of greater public interest than law enforcement. Certainly the public has a legitimate interest in the manner in which law enforcement officers perform their duties."). Moreover, Romero's crimes themselves were "events of legitimate concern to the public." *See Cox Broad. Corp. v. Cohn,* 420 U.S. 469, 492, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). And his flight, as he swerved in and out of freeway traffic at high speeds, posed an immediate and ongoing threat to public safety. *See, e.g., Plumhoff v. Rickard,* —— U.S. ——, 134 S.Ct. 2012, 2021, 188 L.Ed.2d 1056 (2014) (criminal suspect's "outrageously reckless driving posed a grave public safety risk").

¶ 13 As for "context" and "form," Fox broadcast the chase and the suicide during a news program and, as with the picketing at issue in *Snyder,* there is nothing to suggest that the speech was intended to mask a personal attack or otherwise was "contrived to insulate speech on a private matter from liability." *See* 562 U.S. at 455, 131 S.Ct. 1207.

¶ 14 Rodriguez concedes that the police chase was newsworthy. She argues, however, that the few seconds at the end of the video that depicted Romero's death concerned a purely private matter not entitled to First Amendment protection. But the newscast did not merely depict a suicide; it covered a police chase that ended in a suicide. In this context, under *Snyder,* whether speech is a matter of public concern requires "examination of the whole record" of the broadcast. 562 U.S. at 453, 131 S.Ct. 1207. Without doubt, "the overall thrust and dominant theme" of the coverage addressed important matters of public concern. *See id.* at 454, 131 S.Ct. 1207; *cf. Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 248, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) ("[T]he First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive."); *The Florida Star v. B.J.F.,* 491 U.S. 524, 536–37, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) ("It is, clear, furthermore, that the news article concerned 'a matter of public significance'.... That is, the article generally, as opposed to the specific ***41** ****327** identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities.") (citation omitted).

[12] ¶ 15 Rodriguez further argues the First Amendment does not shield the broadcast of the suicide because Fox

could have used a tape delay to cut away before Romero shot himself. She argues that given the nature of the chase, during which Romero had shot at others, and Romero's erratic behavior after he exited the car, Fox should have suspected he might try to kill himself and should have been on alert to cut away before he did so.

¶ 16 As noted, the Fox news anchor apologized at the time for failing to cut away before the suicide, and on appeal, Fox expresses regret over the incident. But no authority supports Rodriguez's argument that a broadcast whose "overall thrust and dominant theme" is a matter of public concern loses First Amendment protection if the broadcaster does not terminate the broadcast when it suspects violence may occur, or fails to use a tape delay to prevent airing of a violent scene after it has occurred. Requiring a broadcaster covering a matter of public concern to cut away whenever a violent or disturbing sight may be caught on camera, or to avoid broadcasting such a scene by use of a split-second tape delay, would chill the broadcaster's news coverage to a degree the First Amendment does not permit. *See, e.g., Boos v. Barry,* 485 U.S. 312, 322, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (we "tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment"); *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 777–78, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986) (rule requiring media defendant in defamation case to prove truth of statement of public concern would unduly chill First Amendment rights); *New York Times v. Sullivan,* 376 U.S. 254, 270–72, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (First Amendment provides "breathing space" to ensure that discourse on public issues remains "uninhibited, robust, and wide-open").

¶ 17 Rodriguez cites cases in which other courts have rejected requests by the press for access to government photographs of death scenes. She argues those cases establish that "the actual depiction of a person's death rarely, if ever, serves any legitimate First Amendment purpose." *See, e.g., Nat'l Archives & Records Admin. v. Favish,* 541 U.S. 157, 124 S.Ct. 1570, 158 L.Ed.2d 319 (2004) (photos of suicide scene); *Marsh v. County of San Diego,* 680 F.3d 1148 (9th Cir.2012) (child's autopsy photos); *Melton v. Bd. of County Comm'rs,* 267 F.Supp.2d 859 (S.D.Ohio 2003) (government morgue); *Catsouras v. Dep't of Cal. Highway Patrol,* 181 Cal.App.4th 856, 104 Cal.Rptr.3d 352 (2010) (photos of corpse). Those decisions concern the press's right to receive copies of documents or other information in the possession of government. Here, Fox possessed the information; the question is whether, consistent with the First Amendment, the broadcaster may be liable for civil damages for publishing it, an issue not addressed in the cases Rodriguez cites.

¶ 18 Rodriguez's reliance on cases addressing the news media's right of access to government proceedings similarly is misplaced. *See, e.g., Garrett v. Estelle,* 556 F.2d 1274 (5th Cir.1977) (reversing order allowing journalist to film execution); *In re The Spokesman–Review,* 569 F.Supp.2d 1095 (D.Idaho 2008) (denying media request to be present during trial testimony by minor victim of sexual assault). These cases turn on the principle that the First Amendment does not guarantee the press special access to information that is not generally available to the public. *See Garrett,* 556 F.2d at 1277. That principle, and the cases Rodriguez cites, do not apply when the press has gained access to information through lawful means, as in this case. *Cf. Smith v. Daily Mail Publ'g Co.,* 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979) (state could not punish newspapers for publishing name of juvenile offender, in violation of state law, when they had learned juvenile's name through lawful means); *Okla. Publ'g Co. v. Dist. Court,* 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977) (reversing order barring press from publishing name of 11–year–old criminal suspect; even though, under state law, juvenile ***42** ****328** proceedings generally are closed, reporters learned name of suspect when attending juvenile's hearing without objection from any party). [2]

2 Rodriguez's citation of *KOVR–TV, Inc. v. Superior Court,* 31 Cal.App.4th 1023, 37 Cal.Rptr.2d 431 (1995), and *Miller v. Nat'l Broad. Co.,* 187 Cal.App.3d 1463, 232 Cal.Rptr. 668 (1986), likewise is of no avail. Unlike the news organizations in those cases, Fox did not intrude a private space, but merely broadcast the events as they unfolded in public.

¶ 19 Finally, Rodriguez cites *Green v. Chicago Tribune Co.,* 286 Ill.App.3d 1, 221 Ill.Dec. 342, 675 N.E.2d 249, 255 (1996), which reversed a trial court's dismissal of tort claims against a newspaper that allegedly published photographs of a patient taken during emergency surgery and printed the dying patient's mother's last words to him, all without consent. The events in that case occurred in the privacy of a hospital room, not, as here, in public view. Moreover, even assuming the Illinois case might apply to

these very different circumstances, we are not persuaded by that court's reasoning because it fails to give due respect to established First Amendment principles.

CONCLUSION

¶ 20 Because the Fox broadcast addressed a matter of public concern, the First Amendment bars the claims for intentional and negligent infliction of emotional distress. We affirm the superior court's order dismissing the complaint.

All Citations

238 Ariz. 36, 356 P.3d 322, 43 Media L. Rep. 2317, 718 Ariz. Adv. Rep. 14

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352 Wis.2d 13
Court of Appeals of Wisconsin.

† Petition for review filed.

Melissa DUMAS, Plaintiff–Appellant, †
v.
Robert KOEBEL and Journal Communications, Inc., Defendants–Respondents.

No. 2013AP365.
|
Submitted on Briefs Oct. 8, 2013.
|
Opinion Filed Nov. 5, 2013.

Synopsis

Background: School bus driver filed suit against investigative news reporter and his employer, alleging invasion of privacy, intentional infliction of emotional distress, and intentional interference with a contractual relationship, arising out of information aired on television by reporter that bus driver had been convicted of prostitution. Defendants filed motions to dismiss. Upon conversation of motions to a motion for summary judgment, the Circuit Court, Milwaukee County, Timothy M. Witkowiak, J., granted summary judgment to defendants. Bus driver appealed.

Holdings: The Court of Appeals, Curley, P.J., held that:

[1] trial court did not abuse its discretion in limiting bus driver's discovery;

[2] statute governing disclosure of information about employees, prohibiting release of employees' names if employer was required to pay prevailing wages, did not apply to prevent bus driver's name from being a matter of public record, such as would preclude bus driver's invasion of privacy claim; and

[3] information aired on television by investigative news reporter that bus driver had been convicted of prostitution was a matter of public concern, such that First Amendment applied to bar claims for intentional infliction of emotional distress and intentional interference with a contract.

Affirmed.

Attorneys and Law Firms

****321** On behalf of the plaintiff-appellant, the cause was submitted on the briefs of Richard H. Schulz of Milwaukee, and Peter J. Schulz, pro hac vice, of San Diego, California.

On behalf of the defendants-respondents, the cause was submitted on the brief of Robert J. Dreps of Godfrey & Kahn, S.C., of Milwaukee.

Before CURLEY, P.J., KESSLER and BRENNAN, JJ.

Opinion

CURLEY, P.J.

***17** ¶ 1 Melissa Dumas appeals the trial court's grant of summary judgment on the three claims—invasion of privacy, intentional infliction of emotional distress, and intentional interference with a contractual relationship—she alleged against Defendants Robert Koebel and Journal Communications, Inc. Defendants broadcast a news story about Milwaukee Public School (MPS) bus drivers with convictions, in which one of Journal Communications' reporters, Koebel, confronted Dumas, a school bus driver, about a past misdemeanor prostitution conviction. Dumas argues that the trial court erred in limiting discovery before deciding Defendants' summary judgment motion. She also argues that summary judgment on her claims was improper as a matter of law. We conclude that: (1) the trial court properly exercised its discretion in limiting discovery; (2) Dumas' invasion of privacy claim is precluded by WIS. STAT. § 995.50(2)(c) (2011–12) [1] because the information in Defendants' broadcast was "available to the public as a matter of public record"; and (3) Dumas' intentional tort claims are precluded by the First Amendment because Defendants' broadcast discussed "a matter of public concern" as defined by *Snyder v. Phelps,* —— U.S. ——, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011). As such, we affirm.

1 All references to the Wisconsin Statutes are to the 2011–12 version unless otherwise noted.

BACKGROUND

¶ 2 On about April 26, 2012, the TMJ–4 (owned by Journal Communications) investigative reporting team, known as the "I-team," aired a news broadcast concerning MPS bus drivers who had criminal records. In the broadcast, one of the I-team's reporters, Koebel, explained how the team made its "explosive" discoveries; ***18** pursuant to public records supplied by the school district, the I-team received a list of over one thousand bus drivers working for the ten or so companies hired by the district to provide busing services to school children. After the I-team received the list, it "got to work" looking into the background of "each" driver. "The I-team searched public records, police reports and ... used mug shots to confirm the identit[ies] of convicted criminals[ ] turned bus drivers."

¶ 3 While the broadcast never stated exactly how many bus drivers were found to have criminal records, it did highlight the histories of three bus drivers with convictions —one of whom was Dumas. ****322** Koebel reported that Dumas had received, eight years earlier, a misdemeanor conviction for prostitution. Koebel revealed salacious details from the police report, including various items that Dumas had brought to a hotel to provide a "good time." Koebel also reported that Dumas had been arrested for "drugs and driving on a suspended license," and that Dumas had been in a school bus accident in 2009 when she worked for a different bus company.

¶ 4 The broadcast featured footage of Koebel confronting Dumas in public with her mug shot and old police reports, and questioning her about her misdemeanor conviction. Dumas, as one might expect, was visibly shocked by Koebel's questioning. The broadcast also showed footage of Koebel sharing information about Dumas' misdemeanor conviction with Dumas' manager at the bus company and of the manager saying that she had no knowledge of the conviction. [2]

[2] It should be noted at this point that Dumas claimed in her brief opposing Defendants' motion to dismiss that her employment application expressly directed her not to list misdemeanor convictions, and the Defendants did not dispute this fact.

***19** ¶ 5 In addition, the Defendants' broadcast featured footage of Koebel confronting MPS Director of Business Services, Mike Turza, about the district's failure to "randomly" check bus drivers' backgrounds, in which the following exchange took place:

> ROB KOEBEL: Will the district start randomly checking backgrounds?
>
> MIKE TURZA: We could do that....
>
> ROB KOEBEL: Will you do that now?
>
> MIKE TURZA: We could do that.
>
> ROB KOEBEL: But you aren't going to commit to that now?
>
> MIKE TURZA: Again, we would commit if there was value to it....
>
> ROB KOEBEL: Ok, the value would be the safety of the children and to hold the bus company accountable[; it] doesn't seem anyone is doing that.
>
> MIKE TURZA: I don't think that is a fair statement at all.

(Quotation marks omitted.)

¶ 6 In concluding the broadcast, Koebel noted that the I-team "presented all of its findings to MPS and the bus companies," and that Dumas was consequently no longer employed as a bus driver, and another featured driver —the "wrong-way driver carrying a gun"—had "been suspended, pending an investigation." "But," Koebel warned in closing, "there could be many convicted criminals still driving buses. And that's information you, as parents, and as tax payers [,] have the right to know."

¶ 7 After the broadcast aired, Dumas sued Defendants for invasion of privacy, intentional infliction of ***20** emotional distress, and intentional interference of a contractual relationship. When the complaint was filed, Dumas' counsel also noticed Koebel's deposition.

¶ 8 Defendants filed a motion to dismiss and a motion to stay discovery until after the motion to dismiss was heard. In their motion to dismiss, Defendants argued that Dumas' invasion of privacy claim must be dismissed because the information published about her in the broadcast was a matter of public record. Defendants also argued that Dumas' other tort claims were similarly precluded because they were "entirely premised on the ... report of truthful information about her," and were

consequently barred by the First Amendment. In support of the motion, Defendants submitted various exhibits, including a video recording of the broadcast; the "internet version of the news story," which appears **323 to be a transcript of the video; and records relating to Dumas' arrest and driving history.

¶ 9 The trial court held a hearing on Defendants' motions and converted the motion to dismiss to a motion for summary judgment. The trial court then heard argument regarding Defendants' motion to stay discovery. Dumas' attorney explained that he wanted to depose Koebel before the motion was decided, but admitted that he did not know what information would be gleaned from the deposition:

> [COUNSEL]: We had filed a notice of deposition to Mr. Koebel with the complaint, which I think is what kind of spurred this whole motion probably to delay things. But we would like to take his deposition. And I don't know where that would lead us. That's the only thing. I don't know what documents he's going to bring....

Counsel for Defendants responded that, because the motion was premised on the fact that Dumas' claims *21 were barred by the First Amendment because they were matters of public record, any discovery should be limited to that issue.

¶ 10 The trial court decided that it would allow discovery only "as it relates to whether the information was obtained through public records." It stated that it would not allow any further discovery.

¶ 11 About two months later, the trial court heard oral arguments on Defendants' converted summary judgment motion and granted summary judgment on all Dumas' claims. Dumas now appeals. Additional background information will be developed as necessary.

ANALYSIS

[1] ¶ 12 Dumas appeals the trial court's decision to limit discovery and the grant of summary judgment. She argues that the trial court erroneously exercised its discretion in limiting discovery to whether the information in Defendants' broadcast was obtained through public records. She also argues that the trial court erred as a matter of law in granting summary judgment. We discuss each issue in turn.

A. The trial court did not err in limiting discovery.

¶ 13 Dumas first argues that the trial court erred in limiting discovery to whether the information in Defendants' broadcast was obtained through public records. We review the trial court's discovery order for an erroneous exercise of discretion. *Lane v. Sharp Packaging Sys., Inc.,* 2002 WI 28, ¶ 19, 251 Wis.2d 68, 640 N.W.2d 788. As the appellant, Dumas has the *22 burden " 'to show that the trial court misused its discretion,' " and we consequently " 'will not reverse unless such misuse is clearly shown.' " *See id.* (citation omitted). Under this standard, we will sustain the trial court's decision if we determine that the trial court "examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *See Sands v. Whitnall Sch. Dist.,* 2008 WI 89, ¶ 13, 312 Wis.2d 1, 754 N.W.2d 439. "In conducting our review, we must examine the [trial] court's on-the-record explanation of the reasons underlying its decision." *Olivarez v. Unitrin Prop. & Cas. Ins. Co.,* 2006 WI App 189, ¶ 17, 296 Wis.2d 337, 723 N.W.2d 131. While the trial court should state its reasons, they " 'need not be exhaustive.' " *Id.* (citation omitted). Moreover, "[w]e will search the record for reasons to sustain the trial court's exercise of discretion." *Lofthus v. Lofthus,* 2004 WI App 65, ¶ 21, 270 Wis.2d 515, 678 N.W.2d 393.

¶ 14 Specifically, Dumas argues that the trial court did not provide reasons for its **324 decision on the record. She also argues that the trial court's ruling prevented her from developing facts that would answer the question of whether Dumas' intentional tort claims were precluded by the First Amendment because the information in Defendants' broadcast was "a matter of public concern," as discussed by *Snyder.*

¶ 15 Dumas has not met her burden to show that the trial court erroneously exercised its discretion. *See Lane,* 251 Wis.2d 68, ¶ 19, 640 N.W.2d 788. While the trial court did not provide a detailed explanation for its decision on the record, it did grant Defendants' request to limit discovery after receiving briefing and hearing extensive argument from both sides. While the trial court permitted discovery

to proceed on whether the information was ***23** obtained through public records, it agreed with Defendants' request to limit inquiry into Koebel's editorial judgment. At the motion hearing, Defendants explained that they sought, in particular, to limit questioning of Koebel to whether he obtained his information from public records and to exclude questioning relating to his "editorial judgment."

> [COUNSEL FOR DEFENSE]: Well, our position is that any discovery on this motion should be related to the issues raised by this motion. And that may include appropriate questioning of Mr. Koebel, but not on all the issues plaintiff mentioned in their brief and in their complaint going to matters of editorial judgment, like what's ambush journalism, and what is reasonably necessary.... Those are matters of editorial judgment the First Amendment does not allow the plaintiff to discover....

[2] **[3]** ¶ 16 Moreover, contrary to what Dumas argues, the trial court's decision comports with the legal standards governing the summary judgment motion. An action for invasion of an individual's right to privacy may not lie if the information communicated is "available to the public as a matter of public record." *See* WIS. STAT. § 995.50(2)(c). Similarly, "[t]he Free Speech Clause of the First Amendment ... can serve as a defense in state tort suits" if the allegedly tortious communication "is of public ... concern." *Snyder,* 131 S.Ct. at 1215. As we will discuss in more detail below, knowing whether the information Defendants relied upon came from public records is relevant to both inquiries. While Dumas argues that the discovery ruling limited her ability to develop facts that would concern the second standard—*i.e.,* whether the communication was a "matter of public concern"—Dumas does ***24** not present any specific examples of how the trial court's ruling limited her discovery or what she would have found had the trial court not issued its ruling. As noted, Dumas' counsel could not even surmise a guess at the motion hearing about what relevant facts Koebel's deposition might unveil.

¶ 17 In sum, given the aforementioned circumstances, the trial court's decision to limit discovery was not an erroneous exercise of discretion.

B. Summary judgment was properly granted on all of Dumas' claims.

¶ 18 Dumas next argues that the granting of summary judgment on her three claims was improper. We review *de novo* the grant or denial of summary judgment, employing the same methodology as the circuit court. *See Smaxwell v. Bayard,* 2004 WI 101, ¶ 12, 274 Wis.2d 278, 682 N.W.2d 923. We will affirm a summary judgment if there exists no genuine issue of material fact and if the movant is entitled to judgment as a matter of law. *Novak v. American Family Mut. Ins. Co.,* 183 Wis.2d 133, 136, 515 N.W.2d 504 (Ct.App.1994); WIS. STAT. § 802.08(2). The ****325** inferences to be drawn from the underlying facts are to be viewed "in the light most favorable to the party opposing the motion." *Lambrecht v. Estate of Kaczmarczyk,* 2001 WI 25, ¶ 23, 241 Wis.2d 804, 623 N.W.2d 751. If there is any reasonable doubt regarding whether there exists a genuine issue of material fact, that doubt must be resolved in favor of the nonmoving party. *Schmidt v. Northern States Power Co.,* 2007 WI 136, ¶ 24, 305 Wis.2d 538, 742 N.W.2d 294.

***25** ¶ 19 As we will explain in more detail below, summary judgment on Dumas' invasion of privacy claim must be granted because the information communicated in Defendants' broadcast was available to the public as a matter of public record. Summary judgment on both her intentional infliction of emotional distress and intentional interference with a contract claims must be granted because the information communicated was a matter of public concern.

1. *Dumas' invasion of privacy claim fails because the information published in Koebel's report was a "matter of public record."*

[4] ¶ 20 Pursuant to WIS. STAT. § 995.50(2)(c), an action for invasion of an individual's right to privacy may not lie if the information communicated is "available to the public as a matter of public record." *See also Cox Broad. Corp. v. Cohn,* 420 U.S. 469, 495, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) ("the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in ... records open to public

inspection"). There is no dispute that Dumas' history —including the misdemeanor conviction highlighted in Koebel's report—is a matter of public record. *See id.*

¶ 21 The issue Dumas presents on appeal is whether her *name,* which Defendants obtained via a public records request, is a matter of public record. Although we have already concluded that the names, and drivers license numbers, of school bus drivers required to be disclosed in an open records law request is a matter of public record, *see Atlas Transit, Inc. v. Korte,* 2001 WI App 286, ¶¶ 5, 14, 26, 249 Wis.2d 242, 638 N.W.2d 625 ("We conclude that the public has a right to know the names of the individuals who are ***26** driving their children to and from school."), Dumas argues that her name was confidential pursuant to WIS. STAT. § 19.36(12), which was enacted after we decided *Atlas Transit, see* 2003 Wis. Act 47, § 7, and that consequently, WIS. STAT. § 995.50(2)(c) does not bar her claim. [3]

3 Dumas characterizes the issue of whether her name is a matter of public record as an issue of fact. It is, in fact, a question of law. *See Atlas Transit, Inc. v. Korte,* 2001 WI App 286, ¶¶ 9, 14, 249 Wis.2d 242, 638 N.W.2d 625.

¶ 22 We are not convinced that release of Dumas' name was precluded by WIS. STAT. § 19.36(12). It provides:

> INFORMATION RELATING TO CERTAIN EMPLOYEES. Unless access is specifically authorized or required by statute, an authority shall not provide access to a record prepared or provided by an employer performing work on a project to which s. 66.0903, 103.49, or 103.50 [4] applies, ****326** or on which the employer is otherwise required to pay prevailing wages, if that record contains the name or other personally identifiable information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information. In this subsection, "personally identifiable information" does not include an employee's work classification, hours of work, or wage or benefit payments received for work on such a project.

4 WISCONSIN STAT. § 66.0903, titled "Municipal prevailing wage and hour scales," concerns pay rates for municipal public works projects (formatting omitted). WISCONSIN STAT. § 103.49, titled "Wage rate on state work," concerns pay rates for state public works projects (formatting omitted). WISCONSIN STAT. § 103.50, titled "Highway contracts," concerns pay rates for highway projects (formatting omitted).

¶ 23 Dumas claims that this statute requires her name to be kept confidential because the bus companies ***27** were "required to pay prevailing wages"; however, she does not support her argument with any authority. [5] *See State v. Pettit,* 171 Wis.2d 627, 646–47, 492 N.W.2d 633 (Ct.App.1992) (court of appeals need not consider undeveloped arguments); *see also Tam v. Luk,* 154 Wis.2d 282, 291 n. 5, 453 N.W.2d 158 (Ct.App.1990) (court of appeals has neither duty nor resources to " 'sift and glean the record' " for facts supporting a party's argument) (citation omitted); *see also Atlas Transit,* 249 Wis.2d 242, ¶¶ 20–23, 638 N.W.2d 625 (explaining that no state or federal law prevents disclosure of bus drivers' names upon public records request). Moreover, Dumas points to no authority overruling *Atlas Transit.* We therefore conclude that *Atlas Transit,* not WIS. STAT. § 19.36(12), applies here.

5 The only information Dumas cites to support her contentions is the letter from the Milwaukee Public Schools Office of Board Governance that initially denied Defendants' public records request for bus drivers' names. The district later decided to release the names of the bus drivers. We also note, for the sake of argument, that even if we would have found the bus drivers names to be wrongfully released, Dumas' dispute would have been with the district, not with Defendants. *Cf. The Florida Star v. B.J.F.,* 491 U.S. 524, 538, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) ("Where, as here, the government has failed to police itself in disseminating information, it is clear ... that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity.").

¶ 24 Therefore, because *Atlas Transit,* not WIS. STAT. § 19.36, governs the case before us, we conclude Dumas' name was a matter of public record. Because the information published in Koebel's report—including Dumas' name and arrest history—was a matter of public record, we must affirm the grant of summary judgment on Dumas' invasion of privacy claim. *See* WIS. STAT. § 995.50(2)(c).

***28** 2. *Dumas' intentional infliction of emotional distress and intentional interference with a contract claims fail because the information published in Koebel's report was a "matter of public concern."*

[5] ¶ 25 Having concluded that summary judgment is proper for Dumas' invasion of privacy claim, we turn to Dumas' intentional tort claims. The trial court determined, and the Defendants argue on appeal, that summary judgment must be granted on both Dumas' intentional infliction of emotional distress and intentional interference with a contract claims because they are barred by the First Amendment. We agree.

¶ 26 "The Free Speech Clause of the First Amendment [6] ... can serve as a defense in state tort suits." *Snyder,* 131 S.Ct. at 1215. At issue is whether the allegedly tortious communication "is of public or private concern." *See id.*

6 The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law ... abridging the freedom of speech, or of the press."

****327** Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public[.]" The arguably "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."

Id. at 1216 (citations and quotation marks omitted).

[6] **[7]** ¶ 27 In deciding whether speech is of public concern, we are required to independently examine the ***29** whole record to analyze "the content, form, and context" of the speech. *See Snyder,* 131 S.Ct. at 1216 (quotation marks omitted). "In considering content, form, and context, no factor is dispositive," and we "evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said." *See id.* If we determine that the allegedly tortious speech is a matter of public concern, we must grant summary judgment on the tort claims alleged against Defendants. *See id.* at 1214, 1221 (affirming judgment as a matter of law on intentional tort claim).

¶ 28 With the proper standard in mind, we turn to Defendants' broadcast. The broadcast was titled "Exposing MPS bus drivers with criminal records," and its purpose, given the facts highlighted and the surrounding discussion, was to inform the public that there were bus drivers who had criminal histories responsible for transporting MPS students and question whether the school district was thoroughly researching the backgrounds of bus drivers. The broadcast provided specific details on the histories of three drivers with criminal backgrounds, one of whom was Dumas. Undoubtedly, Dumas was embarrassed by the airing of the salacious details of her misdemeanor conviction, and certainly the way in which Koebel confronted both Dumas and her manager at the bus company with Dumas' history was embarrassing. However, whether the information aired was "controversial" or "inappropriate" is not the standard we must apply. *See id.* at 1216.

¶ 29 While the information aired about Dumas was undoubtedly embarrassing, we conclude that it *was* a matter of public concern. In the broadcast, details of Dumas' misdemeanor conviction and other arrests appeared as part of a story about individuals with convictions ***30** being entrusted with the safe transport of children. At one point, Koebel confronted MPS Director of Business Services, Mike Turza, about the district's failure to "randomly" check bus drivers' backgrounds. Also, in the broadcast, a parent expressed his frustration with the fact that the district allegedly did not conduct more extensive background checks on its bus drivers. The focus of the broadcast was not to present Dumas' history without context, but to use it to illustrate a perceived problem. As we concluded in *Atlas Transit,* "the public has a right to know ... the individuals who are driving their children to and from school." *See id.,* 249 Wis.2d 242, ¶ 26, 638 N.W.2d 625. In other words, whether public school bus drivers have criminal histories is a matter of public concern.

¶ 30 We find support for our holding in the Supreme Court's *Snyder* decision. In *Snyder,* a group of picketers who believed "that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military," rallied near the funeral of a Marine who had been killed in the line of duty. *Id.,* 131 S.Ct. at 1213. The picketers carried signs that "stated, for instance: 'God Hates the USA/Thank God for 9/11,' 'America is Doomed,' 'Don't Pray for the USA,' 'Thank

God for **328 IEDs,' 'Thank God for Dead Soldiers,' 'Pope in Hell,' 'Priests Rape Boys,' 'God Hates Fags,' 'You're Going to Hell,' and 'God Hates You.' " *See id.* The Marine's family sued the picketers for various torts, including intentional infliction of emotional distress. *Id.* at 1214. Although a jury found in the family's favor on the intentional infliction of emotional distress claim, the Supreme Court ultimately held that the picketers were entitled to judgment as a matter of law because the picketers' speech was protected by the First *31 Amendment. *See id.* at 1214 (relating appellate court's holding), 1221 (affirming appellate court).

¶ 31 *Snyder's* reasoning is particularly instructive. First, in evaluating the "content" of the picketers' signs, the Court determined that they related to "broad issues of interest." *See id.* at 1216. The Court explained that although the signs fell "short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import." *See id.* at 1216–17. Much the same can be said of the publishing of Dumas' history. Some of the information was salacious, but it did highlight a matter of public import: whether such a history should have prohibited an individual from working as a school bus driver. Second, in evaluating the "context" of the picketers' signs, the *Snyder* Court noted that the picketers stood on public land and that there was no preexisting relationship or conflict between the picketers and the Marine that might suggest that the "speech on public matters was intended to mask an attack ... over a private matter." *See id.* at 1217. Likewise, Koebel confronted Dumas in public and asked her questions about public information, and Dumas did not allege any facts showing that she had a preexisting relationship with either Koebel or Journal Communications that would suggest a veiled attempt at a private attack. Finally, in evaluating form, the Court noted that "[t]he protest was not unruly; there was no shouting, profanity, or violence. The record confirms that any distress occasioned by [the picketers] turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself." *See id.* at 1218–19. While Dumas takes issue with the *32 way in which Koebel confronted her, and does appear visibly shocked in the broadcast, it is clear to this court that any surprise, embarrassment, and indignation arose from the content of Koebel's speech, which included the details of her misdemeanor prostitution conviction.

¶ 32 Moreover, we are not persuaded by Dumas' arguments on appeal.[7] Dumas claims, citing *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), that the First Amendment may serve as a defense against intentional infliction of emotional distress claims only in cases involving public figures. While the *Hustler* case did deal with a public figure, *see id.* at 47–48, 108 S.Ct. 876, as we have already seen by examining *Snyder,* the issue before us—whether a defendant's speech is a matter of public concern—is not so limited. *See Snyder,* 131 S.Ct. at 1220–21 (precluding tort liability for speech offensive to the family of a deceased Marine because speech was a "matter of public concern"). Dumas also **329 claims, citing Article 1, Section 3 of the Wisconsin Constitution,[8] that Defendants should be held liable because the broadcast *33 was not published "with good motives and for justifiable ends." However, that inquiry is not before us as this is not a libel case. *See id.* Additionally, Dumas claims that there are "issues of fact" regarding whether Defendants' speech was a matter of public concern. However, as we already explained, this is a question of law. *See Snyder,* 131 S.Ct. at 1215–16.

7 Dumas presents numerous arguments on appeal, some of which are difficult to follow and/or are insufficiently supported. To the extent we do not address an argument we conclude it is not dispositive. *See State v. Waste Mgmt. of Wis., Inc.,* 81 Wis.2d 555, 564, 261 N.W.2d 147 (1978).

8 Article 1, Section 3 of the Wisconsin Constitution provides:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libel, the truth may be given in evidence, and if it shall appear to the jury that the matter charged as libelous be true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

¶ 33 In sum, because the information conveyed by Defendants' broadcast was a matter of public concern, we conclude that Dumas' intentional tort claims are

precluded by the First Amendment, and that summary judgment must be granted.

Judgment affirmed.

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